No. 87-431-ADX Title: Otis R. Bowen, Secretary of Health and Human Services, Appellant
Status: GRANTED v.
Chan Kendrick, et al.

Docketed:
September 14, 1987 Court: United States District Court for the District of Columbia

Vide:
87-253 Counsel for appellant: Solicitor General
87-462
87-775 Counsel for appellee: Benshoof,Janet, McConnell,Michael W.

NOTE* 9/13/87 was a SUNDAY Time to file ext by CJ to & incl. 8/13/87 cited Notice of Appeal filed 8/20/87

Entry	Date	Note	Proceedings and Orders
1	Jul 2 1987		Application for extension of time to docket appeal and order granting same until August 13, 1987 (Chief Justice, July 7, 1987).
2	Sep 14 1987	G	Statement as to jurisdiction filed.
5	Sep 16 1987		Motion of appellees Chan Kendrick, et al. to affirm filed.
3	Oct 16 1987		Memorandum of appellee United Families of America filed. VIDED.
4	Oct 21 1987		DISTRIBUTED. November 6, 1987
6	Nov 9 1987		PROBABLE JURISDICTION NOTED. The case is consolidated with 87-253, 87-462 and 87-775, and a total of one hour is allotted for oral argument. **********
7	Nov 23 1987		Opening brief of appellant/cross-appellee due January 7, 1988; response of appellee/cross-appellant due
8	Nov 23 1987		February 13, 1988: reply brief of appellant/cross appellee due February 23, 1988; reply brief of appellee/
9	Nov 23 1987		cross-appellant due March 4, 1988. See Nos. 87-253 and 87-462.
10	Jan 6 1988		Brief amici curiae of Catholic Charities, et al. filed. VIDED.
11	Jan 7 1988		Brief amicus curiae of Natl. Jewish Commission on Law and Public Affairs filed. VIDED.
12	Jan 7 1988		Brief amicus curiae of US Catholic Conference filed. VIDED.
13	Jan 7 1988		Brief of appellant Bowen, Sec., HHS filed. VIDED.
14	Jan 7 1988		Brief of appellee United Families of America filed. VIDED.
15	Jan 7 1988		Brief amici curiae of Arizona, et al. filed.
17	Jan 7 1988		Brief amicus curiae of Institute for Youth Advocacy filed.
20	Jan 7 1988		Brief amici curiae of Catholic League for Religious and Civil Rights, et al. filed. VIDED.
16	Jan 12 1988		Joint appendix filed. VIDED.
18	Jan 16 1988	G	Motion of the Solicitor General for divided argument filed.
19	Jan 25 1988		Motion of the Solicitor General for divided argument GRANTED.
21	Jan 29 1988		Application for leave to file appellees' brief in excess of page limitation granted by Rehnquist, C.J., on Jan. 29, 1988. Brief not to exceed 60 pages.
22	Feb 3 1988		Brief amicus curiae of Committee for Public Education and

No. 87-431-ADX

Entry	Date	Note	Proceedings and Orders
			Religious Liberty filed. VIDED.
23	Feb 5 1988		SET FOR ARGUMENT, Wednesday, March 30, 1988. (1st case). This case is consolidated with 87-253, 87-462 and 87-775. 1 hour.
25	Feb 12 1988		Brief amicus curiae of Council on Religious Freedom filed. VIDED.
27	Feb 12 1988		Brief amici curiae of Baptist Joint Committee on Public Affairs, et al. filed. VIDED.
29	Feb 12 1988		Brief amici curiae of National Coalition for Public Education, et al. filed. VIDED.
24	Feb 13 1988		Brief amici curiae of NOW Legal Defense and Education Fund, et al. filed. VIDED.
26	Feb 13 1988		Brief amici curiae of Unitarian Universalist Association, et al. filed. VIDED.
28	Feb 13 1988		Lodging received. (11 copies).
30	Feb 13 1988		Brief amici curiae of American Public Health Assn., et al. filed. VIDED.
31	Feb 13 1988		Brief of appellees Chan kendrick, et al. filed. VIDED.
32	Feb 13 1988		Brief amici curiae of Anti-Defamation League of B'Nai B'Brith, et al. filed. VIDED.
33	Feb 23 1988		CIRCULATED.
34	Feb 23 1988	X	Reply brief of appellant United Families of America filed. VIDED.
35	Feb 23 1988		Reply brief of appellant Bowen, Sec., HHS filed. VIDED.
36	Mar 4 1988	X	Reply brief of appellants Chan Kendrick, et al. filed. VIDED.
37	Mar 30 1988		ARGUED.

87-431

No.

Supreme Court, U.S.
FILED
SEP 14 1987
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1987

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, APPELLANT

v.

CHAN KENDRICK, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

JURISDICTIONAL STATEMENT

CHARLES FRIED
Solicitor General

RICHARD K. WILLARD
Assistant Attorney General

ALBERT G. LAUBER, JR.
Deputy Solicitor General

ROBERT J. CYNKAR
Deputy Assistant Attorney General

LAWRENCE S. ROBBINS
Assistant to the Solicitor General

MICHAEL JAY SINGER
JAY S. BYBEE
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

The Adolescent Family Life Act, 42 U.S.C. (& Supp. III) 300z *et seq.*, authorizes federal funds to support demonstration projects designed to discourage adolescent pregnancy and to provide care for pregnant adolescents. The question presented is whether the Act violates the Establishment Clause, either on its face or as applied, insofar as it requires prospective grantees to describe how they will, "as appropriate in the provision of services, * * * involve religious and charitable organizations, voluntary associations, and other groups in the private sector as well as services provided by publicly sponsored initiatives" (42 U.S.C. 300z-5(a)(21)(B)).

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, Reverend Robert E. Vaughn, Reverend Lawrence W. Buxton, Dr. Emmett W. Cocke, Jr., Shirley Pedler, Reverend Homer A. Goddard, Joyce Armstrong, John Roberts, and The American Jewish Congress were plaintiffs in the district court; and Sammie J. Bradley, Katherine K. Warner, and the United Families of America were defendants-intervenors in the district court.

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In the Supreme Court of the United States

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No.

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, APPELLANT

v.

CHAN KENDRICK, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

JURISDICTIONAL STATEMENT

OPINION BELOW

The opinion of the district court (App., *infra,* 1a-46a) is reported at 657 F. Supp. 1547. A subsequent order of the district court (App., *infra,* 52a-55a) is unreported.

JURISDICTION

The interlocutory order of the district court declaring the statute unconstitutional and enjoining the Secretary from enforcing it "as it pertains to 'religious organizations' " (App., *infra,* 47a-49a) was entered on April 15, 1987. A notice of appeal to this Court from that order (App., *infra,* 56a) was filed on May 15, 1987. On July 7, 1987, the Chief Justice extended the time within which to docket that appeal to and including August 13, 1987, and the appeal was docketed on that date as No. 87-253. The order of the district court declaring the statute's references to "religious organizations" to be severable from the balance of the statute, denying appellant's motion to alter or amend the judgment under Fed. R. Civ. P. 59(e), and dismissing the case from the district court's docket, was

entered on August 13, 1987 (App., *infra,* 52a-55a). A notice of appeal to this Court from that order (App., *infra,* 57a) was filed on August 20, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1252.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides in pertinent part:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof * * *.

42 U.S.C. 300z-5(a)(21) provides in pertinent part:

> An application for a grant for a demonstration project for services under this subchapter shall be in such form and contain such information as the Secretary may require, and shall include—
>
> * * * * *
>
> (21) a description of how the applicant will, as appropriate in the provision of services—
>
> * * * * *
>
> (B) involve religious and charitable organizations, voluntary associations, and other groups in the private sector as well as services provided by publicly sponsored initiatives * * *.

STATEMENT

1. The Adolescent Family Life Act, 42 U.S.C. (& Supp. III) 300z *et seq.* (AFLA), "authorizes appropriations for demonstration grants to individuals, public and nonprofit entities for services and research in the area of premarital adolescent sexual relations and pregnancy" (S. Rep. 97-161, 97th Cong., 1st Sess. 1 (1981)). In pertinent part, AFLA provides funding for programs that offer

either "prevention services" (intended to discourage adolescent premarital pregnancy) or "care services" (intended to care for pregnant, unmarried adolescents). The Act is generally designed "to promote self discipline and other prudent approaches to the problem of adolescent premarital sexual relations, including adolescent pregnancy"; "to promote adoption as an alternative for adolescent parents"; and "to establish innovative, comprehensive, and integrated approaches to the delivery of care services * * * for pregnant adolescents" (42 U.S.C. (& Supp. III) 300z(b)(1), (2) and (3)).

In enacting AFLA, Congress found that pregnancy and childbirth, particularly among young adolescents, "often result[ ] in severe adverse health, social, and economic consequences" (42 U.S.C. 300z(a)(5)), and that these issues are "best approached through a variety of integrated and essential services provided * * * by other family members, religious and charitable organizations, voluntary associations, and other groups in the private sector as well as services provided by publicly sponsored initiatives" (42 U.S.C. 300z(a)(8)(B)). The Act accordingly requires applicants for AFLA funds to describe how they will, "as appropriate in the provision of services, * * * involve religious and charitable organizations, voluntary associations, and other groups in the private sector as well as services provided by publicly sponsored initiatives" (42 U.S.C. 300z-5(a)(21)). In establishing this requirement, Congress "recogniz[ed] the limitations of Government in dealing with a problem that has complex moral and social dimensions." Congress concluded that "promoting the involvement of religious organizations in the solution to these problems is neither inappropriate or illegal" but rather "would be a simple recognition that nonprofit religious organizations have a role to play in the provision of services to adolescents" (S. Rep. 97-161, *supra,* at 15-16).

AFLA contains two principal restrictions on the use of grant monies. First, pursuant to Section 300z-3(b)(1), funds may not be used "for the provision of family planning services," unless such services "are not otherwise available in the community." In setting this restriction, Congress determined that "money spent on birth control services under this program would divert resources from the purposes of the act" (S. Rep. 97-161, *supra,* at 13). Second, AFLA grants may be made "only to programs or projects which do not provide abortions or abortion counseling or referral, or which do not subcontract with or make any payment to any person who provides abortions or abortion counseling or referral, except that any such program or project may provide referral for abortion counseling to a pregnant adolescent if such adolescent and the parents or guardians of such adolescent request such referral" (42 U.S.C. 300z-10(a)). Congress concluded that "abortion * * * can be terribly damaging to the physical and mental health of adolescents, and the well-being of their families" and that "legislation, to foster alternatives to abortion, and to encourage adolescents to bring their babies to term, serves a critical national interest" (S. Rep. 97-161, *supra,* at 20).

2. Appellees, a group of taxpayers, clergymen, and the American Jewish Congress, brought this action to enjoin the enforcement of AFLA, claiming that the Act violates the Religion Clauses of the First Amendment. On April 15, 1987, the district court granted summary judgment in appellees' favor (App., *infra,* 1a-49a). Although it acknowledged that AFLA has a valid secular purpose (*id.* at 17a-22a),[1] the court declared the Act unconstitutional,

[1] Specifically, the court found that "the AFLA was motivated by Congress' concern that teenage pregnancy and premarital sexual relations are very damaging to society and, particularly, to adolescents" (App., *infra,* 17a-18a (footnote omitted)). Moreover, the court observed (*id.* at 20a (emphasis in originai)) that the mere fact that this

on its face and as applied, "insofar as religious organizations are involved in carrying out the programs and purposes of the Act" (*id.* at 48a).

The district court first held (App., *infra,* 22a-38a) that the statute on its face has the primary effect of advancing religion because it "explicitly permits religious organizations to be grantees and envisions a direct role for those organizations in the education and counseling components of AFLA grants" (*id.* at 28a). Without deciding whether any of the grantees in this case are "pervasively sectarian" (see *id.* at 23a-28a),[2] the district court stated that participation in AFLA programs by *any* religious organization would inevitably advance religion because those programs involve "*teaching* by grant recipients and subcontractors * * * about the harm of premarital sexual relations and the factors supporting a choice of adoption rather than abortion, and these matters are fundamental elements of religious doctrine" (*id.* at 28a (emphasis in original)). Relying on this Court's decisions involving government aid to parochial schools, the district court explained (*id.* at 30a) that "[t]o presume that AFLA counselors from religious organizations can put their beliefs aside when counseling an adolescent on matters

secular purpose "coincide[s] or conflict[s] with religious tenets does not transform [it] into [a] sectarian purpose[ ] motivated *wholly* by religious considerations." "Religious organizations," the court concluded (*id.* at 21a-22a), "can play a vital role in furthering secular values."

[2] The district court reasoned (App., *infra,* 24a) that a court need only decide whether a grantee is pervasively sectarian where "the connection to a religion is not apparent on the face of the statute or from the nature of the government act itself." Because "the statute, taken as a whole, explicitly permits religious organizations to be grantees and envisions a direct role for those organizations in the education and counseling components of AFLA grants" (*id.* at 28a), the court concluded that there was no need to decide whether any particular grantee or subgrantee under AFLA was pervasively sectarian.

that are part of religious doctrine is simply unrealistic." And the district court found the prospect of religious indoctrination to be particularly likely since AFLA programs involve "impressionable and unlearned adolescent[s]" who receive "one-on-one counseling, a situation in which there are few discernable constraints" (*id.* at 31a).

The district court next held (App., *infra,* 32a-38a) that the statute, as applied, also has the primary effect of advancing religion because grants in practice have been made to religious organizations. The court found (*id.* at 34a-35a) that ten grantees or subgrantees "were themselves 'religious organizations' in the sense that they have explicit corporate ties to a particular religious faith and by-laws or policies that prohibit any deviation from religious doctrine." The court also noted (*id.* at 33a) that other grantees, "while not explicitly affiliated with a religious denomination, are religiously inspired and dedicated to teaching the dogma that inspired them." And the court found that several AFLA programs took place at sites adorned with religious symbols and were administered by members of religious orders, thereby causing participants in the programs to "believe[ ] that these federally funded programs were also sponsored by the religious denomination" (*id.* at 37a).[3] Again, however, the court nowhere found that any of the participating organizations were "pervasively sectarian."

Finally, the district court held (App., *infra,* 39a-43a) that the statute causes excessive government entanglement

[3] The district court also found (App., *infra,* 44a) that "some grantees attempted to evade restrictions [on] * * * religious teaching by establishing programs in which an AFLA-funded staffer's presentations would be immediately followed, in the same room and in the staffer's presence, by a program presented by a member of a religious order and dedicated to presentation of religious views on the subject covered by the AFLA staffer."

with religion. In analyzing the entanglement question, the district court did not distinguish among the various categories of "religious organization" involved here, which include hospitals, maternity homes, and YWCAs. Rather, it surmised that, because AFLA authorizes funds to religious organizations in general, "the risk that AFLA funds will be used to transmit religious doctrine can be overcome only by government monitoring so continuous that it rises to the level of excessive entanglement" (*id.* at 40a). The court also found that "the nature of the aid" in this case—involving, in part, the counseling of "impressionable" adolescents (*id.* at 42a-43a)—"creates the danger that AFLA funds flowing to religious organizations will inescapably advance religion absent continual government monitoring" (*id.* at 41a).[4]

The district court therefore declared AFLA unconstitutional and enjoined its enforcement insofar as it pertains to "religious organizations" (App., *infra,* 46a). The court then ordered the parties to submit briefs on the question whether the "religious organizations" clause is severable from the balance of the Act under this Court's decision in *Alaska Airlines, Inc.* v. *Brock,* No. 85-920 (Mar. 25, 1987). On May 22, 1987, the district court issued an order, staying the effect of its judgment until September 30, 1987, insofar as it pertains to current grantees (App., *infra,* 50a-51a). On August 10, 1987, the Chief Justice issued an order granting a stay pending appeal (No. A-99).

[4] The district court also found (App., *infra,* 43a) that the statute would "tend to incite political division along religious lines" because AFLA programs involve "sensitive issues upon which religions' fundamental beliefs differ." Moreover, the court believed that such division would be "recurring and intensified" (*ibid.*) because appropriations under the Act are made annually. The court acknowledged, however, that "political divisiveness has never been the only ground for holding a statute unconstitutional" (*id.* at 43a), and that "the political division caused by the AFLA may not be sufficient to invalidate it" (*id.* at 44a).

On August 13, 1987, the date on which the Secretary docketed his appeal (No. 87-253) from the district court's interlocutory order, the district court entered a final judgment in the case.[5] In that order, the district court held that AFLA's references to "religious organizations" are severable from the balance of the statute; the court also denied the Secretary's Rule 59(e) motion, which sought clarification as to which organizations should be deemed "religious organizations" for purposes of the district court's injunction (App., *infra*, 52a-55a).

Examining the language and legislative history of AFLA, the district court concluded (App., *infra*, 54a) that "Congress would have enacted the AFLA without its reference to 'religious organizations.' " Moreover, the court found (*ibid.*) that "[a]bsent those references the primary purposes of the AFLA can continue to be accomplished." And the court explained (*ibid.*) that "AFLA is fully and constitutionally operative as law in a manner consistent with the intent of Congress absent its references to 'religious organizations.' "

The court also denied the Secretary's Rule 59(e) motion (App., *infra*, 54a-55a). It stated (*id.* at 54a) that it was "puzzled" by the Secretary's request that it "define the term 'religious organization,' " and it found (*id.* at 55a) that "the language of the [April 15, 1987] Order is clear" on that point. The court also stated (*ibid.*) that "[t]here is * * * ample precedent in numerous statutes and federal regulations defining the term 'religious organizations.' "

THE QUESTION IS SUBSTANTIAL

The district court has held unconstitutional a carefully considered enactment whose constitutionality was explicit-

[5] Although the district court did not enter its final judgment "on a separate document" (Fed. R. Civ. P. 58), the August 13, 1987, order was evidently intended as the district court's final judgment since it "ordered that this case is dismissed from the docket of this Court" (App., *infra*, 55a).

ly addressed and approved by the enacting Congress. In a bipartisan effort, Congress sought to stem the "severe adverse health, social, and economic consequences" of adolescent pregnancy and childbirth (42 U.S.C. 300z(a)(5)), and it determined that religious organizations—together with "family members, * * * charitable organizations, voluntary associations, and other groups in the private sector" (42 U.S.C. 300z(a)(8)(B))—"have a role to play" that does "not violate the constitutional separation between church and state" (S. Rep. 97-161, *supra*, at 15-16). In the district court's view, however, Congress's decision to permit religious organizations to participate in AFLA programs violates the Establishment Clause and may not be enforced.

In reaching that result, the district court relied entirely on this Court's cases involving government aid to parochial schools. That reliance was misplaced. This Court's parochial school cases hinge on the central premise that parochial schools have a "pervasively sectarian" mission that cannot be separated from their various secular functions. In the parochial school setting, the Court has explained, government assistance programs cannot easily be channeled to purely secular ends, absent excessive and entangling monitoring by the state. At the same time, however, the Court has upheld government programs designed to assist religious groups that are not "pervasively sectarian." In these latter cases—many involving what the district court would describe as "religious organizations"—the Court has refused to strike down assistance programs because of the possibility that one or another recipient may misuse a grant that the government had restricted to secular ends.

The district court elided that distinction entirely, assuming instead that *any* religious organization that participates in an AFLA program will inevitably inculcate religious doctrine or, on the other hand, will require ex-

cessive government monitoring in order to avoid doing so. Presuming, at bottom, that religious organizations are indistinguishable, the district court struck down the statute, on its face and as applied. The result cannot be reconciled with this Court's Establishment Clause cases and reflects a marked lack of deference to "the duly enacted and carefully considered decision of a coequal and representative branch of our Government." *Walters* v. *National Ass'n of Radiation Survivors*, 473 U.S. 305, 319 (1985). The question presented is therefore substantial.

1. "A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." *United States* v. *Salerno*, No. 86-87 (May 26, 1987), slip op. 5. Accord, *Roemer* v. *Maryland Public Works Board*, 426 U.S. 736, 761 (1976) (plurality opinion). The district court concluded that appellees had met this challenge, on the theory that there can be *no* religious organization constitutionally capable of participating in AFLA programs. This premise is deeply flawed. Religious organizations vary in structure, purpose, degree of religious affiliation, and commitment to a theological regime. They range in nature and mission from churches and parochial schools (whose functions include the propagation of religious doctrine) to social welfare organizations (which provide aid to the needy without regard to religious orientation, and which are operated by professional staffs bound by ethical standards that preclude religious inculcation). The district court thus erred in barring all religious organizations from participating in ALFA programs without first making a meticulous assessment of each organization's special characteristics.

a. This Court's decisions have drawn a crisp distinction between parochial schools, whose pervasive religious mission often disables them from receiving governmental assistance, and other religious organizations, which are

ordinarily free to participate in government programs on an equal footing. The Court has observed that in parochial schools, education and counseling are "integral part[s] of the dominant sectarian mission * * * in which an atmosphere dedicated to the advancement of religious belief is constantly maintained" (*Meek* v. *Pittenger*, 421 U.S. 349, 371 (1975)). The Court has emphasized that in a parochial school setting "[r]eligious authority necessarily pervades the school system," and that it is the "substantial religious character of * * * church-related schools" (*Lemon* v. *Kurtzman*, 403 U.S. 602, 616, 617 (1971)) that requires the Court to be "particularly vigilant" (*Edwards* v. *Aguillard*, No. 85-1513 (June 19, 1987), slip op. 4). The "danger that a teacher under religious control and discipline poses to the separation of the religious from the purely secular" is a "conflict of functions [that] inheres in the situation" (*Lemon* v. *Kurtzman*, 403 U.S. at 617). See also *Grand Rapids School District* v. *Ball*, 473 U.S. 373, 384-385, 391-392 (1985); *NLRB* v. *Catholic Bishop*, 440 U.S. 490, 501-504 (1979).

But there are a great many "religious organizations"—such as the hospitals and maternity homes providing care to pregnant teenagers here—that are fully capable of discharging their services without permitting "ideological content * * * [to] creep in[]" (*Grand Rapids*, 473 U.S. at 389). "The proposition that the Establishment Clause prohibits any program which in some manner aids an institution with a religious affiliation has consistently been rejected" (*Hunt* v. *McNair*, 413 U.S. 734, 742 (1973)). The Court therefore has upheld governmental assistance programs offered to religious organizations or institutions that were not "pervasively sectarian" in nature. See, *e.g.*, *Hunt* v. *McNair*, *supra*; *Tilton* v. *Richardson*, 403 U.S. 672 (1971).

For example, in *Roemer* v. *Maryland Public Works Board*, a plurality of the Court upheld noncategorical

grants to colleges, among them religiously affiliated colleges, under a statute that simply stipulated that none of the funds could be used for sectarian purposes (426 U.S. at 755-758). Because the grant recipients, while religious, were not pervasively so, the Court was unwilling to assume (as the district court did in the present case) that the recipients would use the funds to promote " 'specifically religious activity' " (*id.* at 759 (quoting *Hunt* v. *McNair*, 413 U.S. at 743)). The Court stressed in *Roemer* that it "must assume that the colleges * * * will exercise their delegated control over use of the funds in compliance with the statutory, and therefore the constitutional, mandate" (426 U.S. at 760). And in marked contrast to the approach taken by the court below, the Court cautioned (*id.* at 761) that "[i]t has not been the Court's practice, in considering facial challenges to statutes of this kind, to strike them down in anticipation that particular applications may result in unconstitutional use of funds."

Indeed, in one of its earliest cases, the Court made much the same point, upholding, in *Bradfield* v. *Roberts*, 175 U.S. 291 (1899), a grant of $30,000 to a hospital to be used for the construction of buildings. The hospital, which was operated by a sisterhood of the Roman Catholic Church, had previously been incorporated by an act of Congress, giving the hospital the power to provide "for the care of such sick and invalid persons as may place themselves under the treatment and care of the said corporation" (Act of Apr. 8, 1864, ch. 50, § 2, 13 Stat. 44). The Court held that although the hospital was "conducted under the auspices of the Roman Catholic Church," which "exercise[d] great and perhaps controlling influence over the management of the hospital," the hospital's charter was limited to the purpose of operating a hospital (175 U.S. at 298). See *Roemer* v. *Maryland Public Works Board*, 426 U.S. at 746. Because the charter ensured that the hospital's mission was not fundamentally religious, the

Court refused to inquire into "the individual beliefs upon religious matters of the various incorporators" (175 U.S. at 298). Even though "the influence of any particular church may be powerful over the members of a non-sectarian and secular corporation," the Court stated, such influence was "surely not sufficient to convert such a corporation into a religious or sectarian body" (*ibid.*).

b. Notwithstanding this central distinction, the court below refused to conduct a careful examination as to whether the AFLA grantees, subgrantees, or other participants are "pervasively sectarian." The district court reasoned that there is no need to make such a determination when "the connection between religion and the challenged government statute or practice is clear from the face of the statute" (App., *infra*, 25a). Because AFLA "envisions a direct role" (*id.* at 28a) for religious organizations, in connection with issues that are the subject of "fundamental * * * religious doctrine" (*ibid.*), the district court concluded that it does not matter whether or not the actual grant recipients are pervasively sectarian.

The district court's legal theory, which it did not attempt to tie directly to any of this Court's decisions (see App., *infra*, 25a), effectively disqualifies religious organizations from the AFLA program simply because they are religiously affiliated. Such discrimination produces a form of "religious gerrymander[]" (*Walz* v. *Tax Commission*, 397 U.S. 664, 696 (1970) (Harlan, J.)); that mode of line-drawing is improper, since a systematic hostility to religious organizations offends the First Amendment as much as governmental establishment of religion. See, *e.g.*, *Abington School District* v. *Schempp*, 374 U.S. 203, 306 (1963) (Goldberg, J., concurring); *Zorach* v. *Clauson*, 343 U.S. 306, 314 (1952); *Illinois ex rel. McCollum* v. *Board of Education*, 333 U.S. 203, 211-212 (1948). The judgment of the district court places religious organizations under a disability, not imposed by Congress, to which no other organization, public or private, is subject.

There is no warrant in this Court's cases for that result. On the contrary, the Court has "dispel[led] any notion that a religious person can never be in the State's pay for a secular purpose" and has long held that "religious institutions need not be quarantined from public benefits that are neutrally available to all." *Roemer* v. *Maryland Public Works Boards*, 426 U.S. at 746. Indeed, a policy that invited participation by private organizations generally, but advised that religious organizations need not apply, might well violate principles of equal protection inherent in the Due Process Clause. See *Widmar* v. *Vincent*, 454 U.S. 263 (1981); *McDaniel* v. *Paty*, 435 U.S. 618 (1978).

c. The district court's analysis also poses a threat to a broad array of well-established federal programs—and, we suspect, state programs—in which religious organizations have traditionally participated and under which they have routinely received government funds. There is a long history of cooperation between government and the charitable arms of the Nation's churches in providing for the needs of the sick,[6] the orphaned,[7] delinquent adolescents,[8] and the poor.[9] Like AFLA, these programs, both federal

[6] See, *e.g.*, *Bradfield* v. *Roberts*, 175 U.S. 291 (1899); *Washington Health Care Facilities Authority* v. *Spellman*, 96 Wash. 2d 68, 633 P.2d 866 (1981); *Abernathy* v. *City of Irvine*, 355 S.W.2d 159 (Ky. 1961), cert. denied, 371 U.S. 831 (1962); *Craig* v. *Mercy Hospital–Street Memorial*, 209 Miss. 427, 45 So.2d 809 (1950); *Kentucky Building Comm'n* v. *Effron*, 310 Ky. 355, 220 S.W.2d 836 (Ct. App. 1949); *Collins* v. *Kephart*, 271 Pa. 428, 117 A. 440 (1921).

[7] See, *e.g.*, *Sargent* v. *Board of Education*, 177 N.Y. 317, 69 N.E. 722 (1904); *Nevada ex rel. Nevada Orphan Asylum* v. *Hallock*, 16 Nev. 373 (1882).

[8] See, *e.g.*, *Schade* v. *Allegheny County Institution District*, 386 Pa. 507, 126 A.2d 911 (1956); *Dunn* v. *Chicago Industrial School for Girls*, 280 Ill. 613, 117 N.E. 735 (1917); *Cook County* v. *Chicago Industrial School for Girls*, 125 Ill. 540, 18 N.E. 183 (1888).

[9] See *e.g.*, *Richter* v. *Mayor & Aldermen*, 160 Ga. 178, 127 S.E. 739 (1925); *Bennett* v. *City of La Grange*, 153 Ga. 428, 112 S.E. 482 (1922).

and state, are administered without regard to the religious affiliation of the grant applicants and those they assist, and without inquiry into the existence of a religious basis for their interest in the program. Yet, like AFLA, each of these programs involves issues that "are fundamental elements of religious doctrine" (App., *infra*, 28a). Under the district court's thesis, all of these programs would risk a violation of the First Amendment.

There is no basis in the cases for such an extravagant view. Indeed, the "cases have recognized that religious institutions and religious practices may, in certain contexts, receive the benefit of government programs and policies generally available, on the basis of some secular criterion, to a wide class of similarly situated nonreligious beneficiaries * * *" (*Marsh* v. *Chambers*, 463 U.S. 783, 809 (1983) (footnote omitted) (Brennan, J., dissenting)). Thus "[n]either the original purposes of the establishment clause nor the needs and values of our contemporary pluralistic society require exclusion of voluntary religious organizations from full participation in a process of socialization for which the state enlists the cooperation of private associations." Giannella, *Religious Liberty, Nonestablishment, and Doctrinal Development Part II: The Nonestablishment Principle*, 81 Harv. L. Rev. 513, 556 (1968).

2. The district court's conclusion that AFLA, as applied, violates the Establishment Clause is marred by the same defects that beset its facial examination of the statute. In making its as-applied judgment, the court likewise refused to examine, on a case-by-case basis, the individual "religious organizations" or even to define what it meant by a "religious organization" (see App., *infra*, 54a-55a). The court simply stated that "at least ten" AFLA grantees or subgrantees had "explicit corporate ties to a particular religious faith * * *" and asserted that the "religious character" of unnamed other AFLA grantees or subgrantees was "indisputable" (App., *infra*, 34a-35a).

This cursory approach cannot be squared with the Court's insistence in *Roemer* that "[t]o answer the question whether an institution is so 'pervasively sectarian' that it may receive no direct state aid of any kind, it is necessary to paint a general picture of the institution, composed of many elements" (426 U.S. at 758). The Court has steadfastly refused to "strike down an Act of Congress on the basis of a hypothetical 'profile' " of the " 'typical sectarian' institution of higher education" (*Tilton* v. *Richardson*, 403 U.S. at 682). And it has explained that "[i]ndividual projects can be properly evaluated if and when challenges arise with respect to particular recipients and some evidence is then presented to show that the institution does in fact possess these [pervasively sectarian] characteristics" (*ibid.*). The district court's refusal to make any such evaluation cannot be sustained.

What is more, because the court declined to address the religious nature of the individual grantees and subgrantees, its order is necessarily vague. The court characterized the phrase "religious organizations" as "self-evident," and found that it "so clearly means organizations with a religious character and purpose that 'one would necessarily need to consult a lawyer to effectively misconstrue it' " (App., *infra*, 40a, quoting *Logan* v. *United States*, 518 F.2d 143, 152 (6th Cir. 1975)). As a result, the court's decision leaves unresolved which organizations now receiving AFLA funds are henceforth to be disqualified from the program, and offers still less guidance to the Secretary in making future funding decisions. Indeed, the district court denied the Secretary's Rule 59 (e) motion seeking clarification on this point (App., *infra*, 54a-55a).

3. Congress enacted AFLA because it perceived a growing crisis among unwed adolescents. Congress found that pregnancy and childbirth, particularly among young adolescents, "often result[] in severe adverse health, social,

and economic consequences, including: a higher percentage of pregnancy and childbirth complications; a higher incidence of low birth weight babies; a higher frequency of developmental disabilities; higher infant mortality and morbidity; a decreased likelihood of completing schooling; a greater likelihood that an adolescent marriage will end in divorce; and higher risks of unemployment and welfare dependency" (42 U.S.C. 300z(a)(5)). To address "a problem that has complex moral and social dimensions" (S. Rep. 97-161, *supra*, at 15), Congress sought to involve the widest possible array of assistance, from both private and public organizations.

As a consequence of the district court's decision, however, large numbers of unmarrried teenagers, some pregnant and others likely to become so, may lose vital benefits that Congress intended them to have. The court's judgment rests on brittle legal premises and assumes facts about the AFLA program and its many participants that the record will not support and that the district court in any event failed to find. That judgment is deeply flawed and warrants this Court's review.

CONCLUSION

Probable jurisdiction should be noted.

Respectfully submitted.

CHARLES FRIED
Solicitor General

RICHARD K. WILLARD
Assistant Attorney General

ALBERT G. LAUBER, JR.
Deputy Solicitor General

ROBERT J. CYNKAR
Deputy Assistant Attorney General

LAWRENCE S. ROBBINS
Assistant to the Solicitor General

MICHAEL JAY SINGER
JAY S. BYBEE
Attorneys

SEPTEMBER 1987

APPENDIX A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 83-3175

CHAN KENDRICK, REVEREND ROBERT E. VAUGHN, REVEREND LAWRENCE W. BUXTON, DR. EMMETT W. COCKE, JR., SHIRLEY PEDLER, REVEREND HOMER A. GODDARD, JOYCE ARMSTRONG, JOHN ROBERTS and THE AMERICAN JEWISH CONGRESS, PLAINTIFFS

v.

DR. OTIS R. BOWEN, JR., Secretary of the Department of Health and Human Services, DEFENDANT

and

SAMMIE J. BRADLEY, KATHERINE K. WARNER and UNITED FAMILIES OF AMERICA,
DEFENDANT-INTERVENORS

[Filed April 15, 1987]

OPINION OF CHARLES R. RICHEY
UNITED STATES DISTRICT JUDGE

I. *INTRODUCTION*

The plaintiffs challenge the constitutionality of the Adolescent Family Life Act ("AFLA"), 42 U.S.C. §§ 300z-300z-10 (1981), on the ground that on its face and as applied the statute violates the Establish-

ment Clause of the First Amendment.[1] The fundamental question in this case is the constitutionality of a statute that allows religious organizations to use government funds for, *inter alia*, the counseling and teaching of adolescents on matters related to premarital sexual relations and teenage pregnancy. Although the Court finds that the AFLA has a valid secular purpose, it also finds that the AFLA, on its face, has the primary effect of advancing religion and fosters an excessive entanglement between government and religion. Moreover, the undisputed facts show that AFLA grants awarded to religious organizations have the primary effect of advancing religion. Therefore, the Court must hold that the AFLA is unconstitutional both on its face and as applied.[2] Accordingly, the Court will grant plaintiffs' motion for summary judgment and will deny defendant's and defendant-intervenors' cross-motions for summary judgment by Order of even date herewith.

The Court is sensitive to the fact that its Opinion discusses particular beliefs and also discusses prac-

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[1] The First Amendment states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." U.S. Const. amend. I.

[2] *Notwithstanding anything to the contrary herein, and with knowledge of plaintiffs' vigorous arguments in favor of a declaration that the entire AFLA is unconstitutional, the Court today only decides that the AFLA is unconstitutional insofar as it involves religious organizations in carrying out the purposes of the Act and declares that the involvement of religious organizations as AFLA grantees or subgrantees is unconstitutional. The Court specifically reserves judgment as to whether the plaintiffs are correct in arguing that the constitutionally infirm language is not severable, pending further briefing in view of Alaska Airlines v. Brock*, 55 U.S.L.W. 4396 (Mar. 25, 1987).

tices in which particular religious organizations have engaged. The Court intends nothing in this Opinion to reflect adversely on any religion. The Court notes that it is apparent from the party plaintiffs, defendant, and defendant-intervenors in this case that members of the same religious groups do disagree about the validity of the AFLA and hold differing, religiously based, beliefs about the program's goals. The Court also notes that this division obtains among Protestants, Catholics, Jews and others, and wishes to be quite clear that it discusses particular religions only insofar as is absolutely necessary for this Opinion.

No judge enjoys deciding a constitutional challenge to a United States statute. Because federal laws are enacted by Congress and approved by the Chief Executive, courts rightly employ a variety of doctrines in order to avoid overruling our co-equal branches of government. In deference to the considered judgments of the other branches, a court must strive, if possible, to avoid the constitutional issue altogether. *See Pennsylvania v. Ritchie*, 107 S. Ct. 989, 1011 (1987) (Stevens, J., dissenting). As this case raises only constitutional issues, however, the Court does not have that option.

A second principle of judicial abstention is that a Court must avoid, if possible, finding that a statute does not conform to the requirements of the Constitution. *See Rescue Army v. Municipal Court of Los Angeles*, 331 U.S. 549, 568 (1947). Equally fundamental, if compelled to find a statute unconstitutional, a Court's decision should be so circumscribed as to wreak the least havoc on the law. As such, courts ought not leap to declare a statute invalid where they can merely proscribe a practice under that law. *See Erznoznik v. Jacksonville*, 422 U.S.

205, 215-16 (1975); *Rescue Army*, 331 U.S. at 569. But, after careful study, the Court has concluded that these principles, which the Court wholeheartedly accepts, are somewhat at odds with Establishment Clause case law.

While little else is clear in Establishment Clause case law, it is obvious that the distinction between a challenge to a statute on its face and as applied has not been clearly delineated. The precedents take as their form of analysis a consideration of the *possible* applications of a particular statute, *see, e.g., Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756, 779-83 (1973), then analyze the statute's actual application, *see e.g., id.*; *Levitt v. Committee for Public Education and Religious Liberty*, 413 U.S. 472, 479-82 (1973), and finally, even if the application is the only constitutionally offensive element to which the court has pointed, strike down the statute on its face. *See, e.g., Wolman v. Walter*, 433 U.S. 229, 255 (1977)); *Roemer v. Board of Public Works*, 426 U.S. 736, 767 (1976).

This method of analysis, so different from that usually employed when considering constitutional claims, leaves this Court only one alternative if it is to abide by the teachings of the Supreme Court, which trial judges must. Accordingly, even though the Court does not relish the task, it has no alternative but to consider the statute *both* on its face and as applied. In the end, however, this double duty matters little because the AFLA is unconstitutional both on its face and as applied.

II. *BACKGROUND*

The AFLA is a Congressional response to the severe and manifold problems resulting from teenage pregnancy and associated problems. *See* 42 U.S.C.

§ 300z(a). The Act was designed to prevent adolescent pregnancy by promoting self-discipline, and to mitigate or eviscerate the severe economic, social and health problems that often result from premarital sexual relations and teenage pregnancy. *See* 42 U.S.C. § 300z(b).

While the AFLA has three general program categories—care, prevention and research, *see* 42 U.S.C. §§ 300z-2 & 300z-7, the plaintiffs contest the constitutionality only of the care and prevention services.

"Care services" include pregnancy testing, maternity counseling, adoption and referral services, and primary and preventive health services. *See* 42 U.S.C. § 300z-1(a)(7).

"Prevention services" are services to discourage adolescent sexual relations, referral services for the treatment of venereal disease, counseling and family planning services. *See* 42 U.S.C. § 300z-1(a)(8).

With the exception of pregnancy testing, child care and transportation services, all of the care and prevention services involve some form of referral, teaching or counseling services. *See* 42 U.S.C. 300z-1(a)(4). Seven of the seventeen listed services explicitly involve education and counseling, and two involve activities intimately related to counseling—outreach and planning services. *See id.* All of these programs are targeted to help pregnant adolescents, particularly children of high school age. *See* 42 U.S.C. §§ 300z(b)(3) & 300z-1(a)(9).

Although the Court must consider the AFLA as a whole, two sections are particularly relevant to the Court's decision. First, the AFLA requires applicants to describe how they

> will, as appropriate in the provision of services . . . *involve* . . . *religious* and charitable *organi-*

zations, voluntary associations, and other groups in the private sector as well as services provided by publicly sponsored initiatives. . . .

42 U.S.C. § 300z-5(a)(21) (emphasis added). Secondly, the AFLA limits funding

> to programs or projects which do not provide abortions or abortion counseling or referral, or which do not subcontract with or make any payment to any person who provides abortions or abortion counseling or referral, except that any such program or project may provide referral for abortion counseling to a pregnant adolescent if such adolescent and the parents or guardians of such adolescent request such referral; and grants may be made only to projects or programs which do not advocate, promote, or encourage abortion.

42 U.S.C. § 300z-10(a).[3]

The plaintiffs contend that these two sections, when read together, not only permit religious organizations to use government funds to provide counseling-type services, but restrict AFLA funding of religious organizations to those that oppose abortion. *See* Amended Complaint ¶¶ 2-4 (filed Dec. 29, 1983). Moreover, the plaintiffs assert that religious organizations have received AFLA funds, either directly as

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[3] The Court notes that it does not decide any issue relating to abortion. The only issue decided by the Court is whether the AFLA violates the Establishment Clause of the First Amendment. And the Court holds that the AFLA violates the Establishment Clause solely because the statute impermissibly involves religious organizations in the provision of education and counseling services provided under the Act.

grant recipients or indirectly through their affiliation with secular grantees, to provide such services. For these reasons, the plaintiffs claim that the AFLA, both on its face and as applied, violates the Establishment Clause of the First Amendment.

The defendants argue that the Establishment Clause does not absolutely prohibit religious organizations from receiving government funding. The defendants contend that the AFLA permits religious organizations to provide services that are secular in purpose, and that the provision of these services does not foster an excessive entanglement between government and religion.

III. *BECAUSE THE MATERIAL FACTS ARE NOT IN DISPUTE, SUMMARY JUDGMENT IS APPROPRIATE IN THIS CASE.*

Pending before the Court are three cross motions for summary judgment and a motion for judgment on the pleadings. It is evident from the extent of the record in this case and from the motions themselves that the parties have had more than ample opportunity to submit all material pertinent to a motion for summary judgment. Therefore, the Court will treat the motion for a judgment on the pleadings under Rule 12(c) as a motion for summary judgment pursuant to Rule 56. *See* Fed. R. Civ. P. 12(c); *Public Citizen v. Lockheed Aircraft Corporation*, 565 F.2d 708, 711 n.5 (D.C. Cir. 1977). After carefully and exhaustively considering the motions, the statements of material fact not in dispute, the allegations of disputed facts, the golconda of documents submitted to the Court, and the case law, the Court finds that the material facts are not in dispute and that sum-

mary judgment is appropriate. *See* Fed. R. Civ. P. 56(c); *Celotex Corporation v. Catrett*, 106 S. Ct. 2548, 2553 (1986); *Anderson v. Liberty Lobby, Inc.*, 106 S. Ct. 2505, 2511 (1986).

IV. *THE FEDERAL TAXPAYER PLAINTIFFS HAVE STANDING TO BRING THIS ACTION BECAUSE THEY RAISE AN ESTABLISHMENT CLAUSE CHALLENGE TO THE AFLA, WHICH WAS ENACTED PURSUANT TO THE TAXING AND SPENDING CLAUSE.*

Article III of the Constitution demands that plaintiffs who bring a lawsuit have standing to pursue the claims that they raise. *See, e.g., Flast v. Cohen*, 392 U.S. 83, 94-99 (1968). The defendants and defendant-intervenors do not contest plaintiffs' standing to challenge the constitutionality of the AFLA on its face. They argue instead that the plaintiffs do not have standing to challenge the Act as applied and, therefore, this Court may not even consider the actual AFLA grantees and programs. The Court disagrees. Because the federal taxpayer plaintiffs raise an Establishment Clause challenge to an enactment pursuant to the taxing and spending clause, they satisfy the test for taxpayer standing set forth in *Flast*, 392 U.S. at 102-03.[4] Accordingly, they have standing

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[4] The Court is aware that *Flast* predates more recent Supreme Court decisions that have in part changed the law of standing. Indeed, the Court discusses at length the most important of these more recent opinions, *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464 (1982). *See infra* pp. 14-15. But neither *Valley Forge* nor any other decision has expressly overruled *Flast*, which continues to have vitality at least insofar as subsequent decisions have not expressly contradicted its holding.

to challenge the AFLA both on its face and as applied.

In *Flast*, the Supreme Court held that federal taxpayers have standing to challenge the constitutionality of 1) an exercise of congressional power under the taxing and spending clause[5] if 2) the basis for the challenge is that the statute violates the Establishment Clause. *See id.* at 102-03. Because the AFLA was enacted pursuant to the taxing and spending clause, *see* Plaintiffs' Statement of Material Facts ("Plaintiffs' Facts") ¶ 1, and the plaintiffs allege that the AFLA violates the Establishment Clause, *see* Amended Complaint ¶¶ 1, 49 & 50, the only question with regard to plaintiffs' standing to challenge the AFLA as applied is whether they contest an "exercise of congressional power."

This is what the defendant and defendant-intervenors deny. They argue that because the AFLA is administered by the Department of Health and Human Services ("HHS"), the plaintiffs' challenge to the AFLA as applied contests executive, rather than congressional, action. Careful consideration of the facts in the *Flast* case shows why defendants are in error.

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[5] The taxing and spending clause provides: "The Congress shall have Power to lay and collect Taxes, Duties, Imports and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States . . . ." U.S. Const. art. I, § 8.

In *Flast v. Cohen* the plaintiffs challenged the constitutionality of government funding of educational services and materials to private, largely parochial schools under the Elementary and Secondary Education Act of 1965 ("Education Act"). *See* 392 U.S. at 85-88. The Education Act delegated to the Department of Health, Education and Welfare ("HEW," now HHS) the task of disbursing the funds appropriated under the Education Act in a manner consistent with the standards and restrictions established by the Act. *See id.* at 86-88. The Court held that, notwithstanding HEW's role in disbursing the appropriated funds, the funds were disbursed in accordance with congressional standards and therefore plaintiffs challenged an exercise of congressional power. *See id.* at 87. Accordingly, the Court also held that the logical nexus between plaintiffs' status as taxpayers and their challenge to an appropriation under the taxing and spending clause was sufficient to give plaintiffs standing. *See id.* at 102-03.

The scheme upheld in *Flast* is precisely analogous to the AFLA. Just as in the statute at issue in *Flast*, in the AFLA Congress delegated to HHS the task of disbursing the appropriated funds in a manner consistent with the standards and restrictions established by the AFLA. *See* 42 U.S.C. § 300z-2; Plaintiffs' Facts ¶ 2. By disbursing funds appropriated for the AFLA, HHS merely executes congressional power pursuant to the standards set by Congress, just as its predecessor agency did under the law upheld in *Flast*. Accordingly, *Flast*, never having been overruled, dictates a finding that the federal taxpayer plaintiffs here have challenged an exercise of *congressional* power despite HHS's role in disbursing the appropriated funds.

Notwithstanding the similarities between this case and *Flast*, the defendant and defendant-intervenors claim that this case is controlled by the Supreme Court's more recent decision in *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464 (1982). The *Valley Forge* case involved the Federal Property and Administrative Services Act of 1949 ("Property Act"), which pursuant to the property clause[6] gave HEW the power to sell the federal government's surplus real property. *See id.* at 466-67. Under the Property Act, HEW had broad discretion to grant public benefit allowances, which effectively decreased the price of the property. *See id.* at 467. The plaintiffs in the *Valley Forge* case challenged HEW's decision to transfer a parcel of federal property to Valley Forge Christian College and to offset the entire price of the property with a 100% public benefit allowance. *See id.* at 468.

There is an essential difference between the executive action at issue in *Flast* and that at issue in *Valley Forge*. Unlike HEW's actions in *Flast*—and unlike HHS's actions with respect to the AFLA—HEW was not carrying out an exercise of congressional power when it gave Valley Forge Christian College a free parcel of property. *See id.* at 479 & n.15. Instead, pursuant to its broad statutory discretion, the executive agency itself decided whether and how much to offset the price of surplus federal property with a public benefit allowance. *See id.* at

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[6] The property clause states: "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States . . . ." U.S. Const. art. IV, § 3.

468. Unlike the plaintiffs in *Flast*, the *Valley Forge* plaintiffs could not point to a close, logical connection between their standing as taxpayers and HEW's action. Moreover, the action at issue in *Valley Forge* was not related to the taxing and spending clause but proceeded under the Property Clause of the Constitution. Consequently, the Supreme Court found that these plaintiffs did not have standing to sue. *See id.* at 479-80 & n.17.

Thus *Valley Forge* does not prevent the federal taxpayer plaintiffs in the instant case from having standing to sue. There is a sufficiently close nexus between the individual plaintiffs' standing as federal taxpayers and their challenge to the AFLA. In contrast to *Valley Forge*, but as in *Flast*, the federal taxpayer plaintiffs here maintain that an exercise of congressional power under the taxing and spending clause violates the Establishment Clause. Again, unlike *Valley Forge*, but as in *Flast*, the nexus between the plaintiffs' status as federal taxpayers and Congress' appropriation of AFLA funds under the taxing and spending clause is not significantly weakened by HHS's disbursement of those funds. Therefore, the federal taxpayer plaintiffs have standing to challenge the AFLA both on its face and as applied.[7]

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[7] Since the "case or controversy" requirement of Article III is satisfied by the standing of the federal taxpayer plaintiffs, the Court need not decide whether the clergy and the American Jewish Congress have standing. *See, e.g., Watt v. Energy Action Educational Foundation*, 454 U.S. 151, 160 (1981), *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 264 & n.9 (1977); *Buckley v. Valeo*, 424 U.S. 1, 12 (1976) (per curiam); *ACLU v. City of St. Charles*, 794 F.2d 265, 269 (7th Cir.), *cert. denied*, 107 S. Ct. 458 (1986).

V. *BECAUSE THE AFLA DOES NOT MAKE EXPLICIT AND DELIBERATE DISTINCTIONS AMONG RELIGIONS, THE COURT MUST USE THE TRIPARTITE TEST SET FORTH IN LEMON V. KURTZMAN TO EVALUATE THE STATUTE.*

Having found that the plaintiffs have standing, the Court must now consider whether the AFLA comports with the Establishment Clause. Until recently, it seemed evident that a Court would use the three-part test set forth in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), when called upon to determine whether a statute comports with the Establishment Clause. In *Larson v. Valente*, 456 U.S. 228 (1982), however, the Supreme Court held that a statute that explicitly and deliberately discriminates among religious denominations is suspect and must be reviewed with "strict sc[r]utiny." *See id.* at 246-47. The plaintiffs here argue that the AFLA must be reviewed under a strict scrutiny standard because it contains a denominational preference to the extent that it restricts funding to those religious organizations that oppose abortion. The Court cannot agree.

The Minnesota statute at issue in *Larson* explicitly exempted from certain state requirements any religious organization that received more than 50% of its contributions from its own members. *See id.* at 231-32. Because this "fifty percent rule" made "explicit and deliberate distinctions" between well-established churches and "new churches" that largely depend on public solicitation, the Court tested the rule under a standard of strict scrutiny. *Id.* at 246-47 & n.23.

Larson's strict scrutiny analysis, however, applies only in limited circumstances. This is clear from the Court's discussion in *Larson* of the case of *Gillette v. United States*, 401 U.S. 437 (1971). *Gillette* involved an Establishment Clause challenge to the Military Selective Service Act ("MSSA") of 1967, which afforded conscientious objector status to any person who, "by reason of religious training and *belief* . . . was conscientiously opposed to participation in war *in any form.*" *Id.* at 441 (emphasis added). Thus, Quakers could object because they opposed all wars, whereas Catholics could not because they opposed only unjust wars. The Catholic plaintiff challenging the MSSA argued that strict scrutiny should apply because differences in religious beliefs only permitted members of select religions to benefit from the conscientious objector status. In *Larson*, the Supreme Court noted that, apart from the difference in religious beliefs concerning war, the *Gillette* statute did "not discriminate on the basis of religious affiliation;" the conscientious objector status was *available* on an equal basis to members of all religions. *Larson*, 456 U.S. at 446 n.23. As such, the *Larson* court found that the MSSA did not "explicitly and deliberately" discriminate against Catholics and, therefore, the tripartite *Lemon* test—not the strict scrutiny analysis—remained the proper method for analyzing the MSSA. *See id.* The *Lemon* test is the equally proper analytic tool in the case at bar.

If anything, the AFLA makes even fewer distinctions among religions than did the statute at issue in *Gillette*. By prohibiting a grant recipient from advocating abortion in an AFLA program or project, the AFLA does not condition a "benefit" on a particular religious belief but merely restricts a *program or project* from using federal tax dollars to advocate a particular course of action. *See* 42 U.S.C. § 300z-10. Although the prohibition against advocating abortion, like opposition to war in any form, may coincide or conflict with religious precepts, that fact does not require the Court to analyze the AFLA pursuant to a strict scrutiny analysis. *See Larson*, 456 U.S. at 466 n.23; *Gillette*, 401 U.S. at 441; *see also, Bob Jones University v. United States*, 461 U.S. 574, 604 n.30 (1983) (regulation does not violate the Establishment Clause merely because it coincides or harmonizes with the tenets of some or all religions); *Harris v. McRae*, 448 U.S. 297, 319-20 (1980) (same); *McGowan v. Maryland*, 366 U.S. 420, 442 (1961) (same); *Crowley v. Smithsonian Institution*, 636 F.2d 738, 742-43 (D.C. Cir. 1980) (same). As such, because the AFLA does not discriminate on the basis of religious affiliation or belief, the strict scrutiny test applied in *Larson* is not the proper standard by which to construe the AFLA;[8] rather, the AFLA must be tested under the three-part test set forth in *Lemon v. Kurtzman*.

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[8] Even if strict scrutiny were the appropriate test, the Court's holding would likely be no different. Under strict scrutiny, a law is invalid unless it serves a compelling governmental interest and is narrowly tailored to further that interest—a test that is, if anything, more stringent than the tripartite *Lemon* test. *See Larson*, 456 U.S. at 246-47.

VI. *ALTHOUGH THE AFLA HAS A VALID SECULAR PURPOSE, IT IS UNCONSTITUTIONAL ON ITS FACE BECAUSE IT HAS THE PRIMARY EFFECT OF ADVANCING RELIGION AND FOSTERS AN EXCESSIVE ENTANGLEMENT BETWEEN GOVERNMENT AND RELIGION, AND IT IS UNCONSTITUTIONAL AS APPLIED BECAUSE IT HAS THE PRIMARY EFFECT OF ADVANCING RELIGION.*

The appropriate test for determining whether the AFLA violates the Establishment Clause is set forth in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). To withstand scrutiny under the *Lemon* test the AFLA 1) must have a valid secular purpose, 2) must not have the primary effect of advancing or inhibiting religion, and 3) must not foster excessive entanglement between government and religion. *See id.* at 612-13. If the AFLA fails *any one* of these three parts of the *Lemon* test, then the Court must declare the statute unconstitutional.

In addition, political divisiveness, while never the only ground for holding a statute unconstitutional, is a fourth factor often considered by courts. A statute that causes political division along religious lines is more likely to offend the Establishment Clause than one that does not. *See Meek v. Pittenger*, 421 U.S. 349, 365 n.15, 372 (1975); *Lemon*, 403 U.S. at 622-25; *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756, 794-98 (1973); *Tilton v. Richardson*, 403 U.S. 672, 688-89 (1971); *Walz v. Tax Commission*, 397 U.S. 664, 698-700 (1970) (Harlan, J., concurring); *Board of Education v. Allen*, 392 U.S. 236, 249 (1968) (Harlan, J., concurring); *see also Lynch v. Donnelly*, 465 U.S. 668, 689 (1984) (O'Connor, J., concurring) (political divisiveness is not an independent test of constitutionality). Therefore, the Court will asesss whether the AFLA may, or has, caused political division along religious lines, even though this factor has never been held to be dispositive.

The Court will now consider each of these four factors in turn.

A. *The AFLA Has a Valid Secular Purpose of Combating Teenage Pregnancy and Associated Ills.*[9]

Courts invalidate legislation or governmental action on the ground that it lacks a valid secular purpose only when the statute or activity involved is motivated *wholly* by religious considerations. *See Lynch*, 465 U.S. at 680; *Stone v. Graham*, 449 U.S. 39, 41 (1980) (per curiam); *Epperson v. Arkansas*, 393 U.S. 97, 107-109 (1968); *Abington School District v. Schempp*, 374 U.S. 203, 223-24 (1963); *Engel v. Vitale*, 370 U.S. 421, 424-25 (1962). Even when the benefits to religion are substantial, and motivation to advance or benefit religion is apparent, courts have found no conflict with the Establishment Clause as long as they can discern some intended and valid secular purpose. *See Lynch*, 465 U.S. at 680. Contrary to the plaintiffs' claim that the asserted purpose of the statute is pretextual, the Court finds that the AFLA has a valid secular purpose and its purpose therefore does not offend the Establishment Clause.

As mentioned on pages 8-9, above, the AFLA was motivated by Congress' concern that teenage pregnancy and premarital sexual relations are very dam-

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[9] However, as explained in section VI, subsections B and C, *see infra* pp. 26-26, the statute is unconstitutional, despite its valid purposes, because of its primary effect of advancing religion and its excessive entanglement of government and religion.

aging to society and, particularly, to adolescents.[10]

[10] Congress found that:

(1) in 1978, an estimated one million one hundred thousand teenagers became pregnant; more than five hundred thousand teenagers carried their babies to term, and over one-half of the babies born to such teenagers were born out of wedlock;

(2) adolescents aged seventeen and younger accounted for more than one-half of the out of wedlock births to teenagers;

(3) in a high proportion of cases, the pregnant adolescent is herself the product of an unmarried parenthood during adolescence and is continuing the pattern in her own lifestyle;

(4) it is estimated that approximately 80 per centum of unmarried teenagers who carry their pregnancies to term live with their families before and during their pregnancy and remain with their families after the birth of the child;

(5) pregnancy and childbirth among unmarried adolescents, particularly young adolescents, often results in severe adverse health, social and economic consequences, including: a higher percentage of pregnancy and childbirth complications; a higher incidence of low birth weight babies; a higher frequency of developmental disabilities; higher infant mortality and morbidity; a decreased likelihood for completing schooling; a greater likelihood that an adolescent marriage will end in divorce; and higher risks of unemployment and welfare dependency; • • • • •

(7) an unmarried adolescent who becomes pregnant once is likely to experience recurrent pregnancies and childbearing, with increased risks;

• • • • •

(8) (A) the problems of adolescent premarital sexual relations, pregnancy and parenthood are multiple and complex and are frequently associated with or are a cause of other troublesome situations in the family . . . .

42 U.S.C. § 300z(a).

The AFLA funds care, prevention and research projects intended to alleviate the causes and consequences of these problems. *See* 42 U.S.C. §§ 300z(b). Specifically, the AFLA encourages parents and family members to provide guidance and support to adolescents by promoting prudent approaches, such as self-discipline, to the problem of premarital sexual relations. *Id.* It promotes adoption, establishes innovative, comprehensive and integrated care services for pregnant adolescents, and supports research and demonstration projects concerning the causes and consequences of adolescent premarital sexual relations, contraceptive use, pregnancy and child rearing. *See id.* The statute also funds research on alleviating the negative consequences of adolescent premarital sexual relations and pregnancy, and it provides funds for disseminating the results and findings of these programs. *See* 42 U.S.C. § 300z(b)(4)-(b)(6).

The Court can only conclude from the indisputable language of the AFLA that the statute's purpose was to solve the problems caused by teenage pregnancy and premarital sexual relations. This is a valid secular purpose.[11] This conclusion is buttressed by the

[11] The plaintiffs rely on *Stone v. Graham*, 449 U.S. 39, 41 (1981), to support their argument that an "avowed secular purpose" is not sufficient to avoid conflict with the First Amendment if it is merely a pretext for a purpose that is actually religious. Plaintiffs' legal theory is correct, but it is not applicable to the facts of this case. The "secular" purpose declared pretextual in *Stone* was a self-serving notation, in small print at the bottom of copies of the Ten Commandents, that the Ten Commandments have a secular application. *See id.* at 41. The AFLA is clearly devoid of the religious overtones associated with the Ten Commandments.

Amici Curiae argue that the ALFA does not have a valid secular purpose because it involves religious organizations in

uncontroverted fact that a significant amount of AFLA grants have been awarded to non-sectarian grantees to provide care and counseling services to adolescents. That these secular purposes coincide or conflict with religious tenets does not transform them into sectarian purposes motivated *wholly* by religious considerations. *Cf. Bob Jones University v. United States*, 461 U.S. 574, 604 n.30 (1983); *Harris v. McRae*, 448 U.S. 297, 319-20 (1980); *McGowan v. Maryland*, 366 U.S. 440, 442 (1961); *Crowley v. Smithsonian Institution*, 636 F.2d 738, 742-43 (D.C. Cir. 1980). The Court must therefore find that the AFLA, both on its face and as applied, was not motivated *wholly* by religious considerations but has a valid secular purpose.

The plaintiffs admit that the AFLA incorporates some secular values, *see* Plaintiffs' Motion for Summary Judgment at 33 n.57, but they argue that the real purpose of the AFLA can properly be determined only in light of the AFLA's predecessor statute—Title VI of the *Public Health Services Act*. The plaintiffs contend that a comparison of the AFLA and Title VI demonstrates that the AFLA was motivated wholly by religious considerations. The critical fact, argue the plaintiffs, is that Title VI was specifically amended to involve religious organizations. Title VI required applicants to describe how they will involve public and private agencies, *see* Title VI § 605(a)(7), whereas the AFLA explicitly requires applicants to describe how they

> will . . . involve families, . . . religious and charitable organizations, voluntary associations, and other groups in the private sector as well as services provided by publicly sponsored initiatives . . .

42 U.S.C. § 300z-5(a)(21).

Even admitting this difference between Title VI and the AFLA, the Court cannot find that the AFLA was motivated *wholly* by religious considerations. First, Title VI was amended not only to add religious organizations to the list of entities that may participate in AFLA programs, but also to add families, charitable organizations, voluntary associations and other groups. *See* 42 U.S.C. § 300z-5(a)(21)(B). Religious organizations are only one of five types of entities that may be involved in an AFLA program. Secondly, at most, only the language permitting the involvement of religious organizations was motivated by religious considerations. This, however, does not mean that the entire AFLA was motivated *wholly* by religious considerations, as it would have to be in order to find that the AFLA has no valid secular purpose. Other reasons, such as the need for greater resources, more programs, and earlier intervention also motivated Congress to amend Title VI. *See* S. Rep. No. 97-161, 97th Cong. 1st Sess. 7-9 (1981). Finally, and most important, religious organizations

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a program whose objectives could equally be met without those groups. To support this argument, *amici* rely on *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 123-24 (1982). *See Amici Curiae* Memorandum in Support of Plaintiffs' Motion for Summary Judgment at 5 (Feb. 25, 1985). *Larkin*, however, does not support this contention. Although in *Larkin* the Supreme Court noted that the statute's secular objectives could be accomplished by other means, the secular purpose of that statute was not challenged. *See Larkin*, 459 U.S. at 119, 124. Indeed, the Court stated that "[t]here can be little doubt that this [statute] embraces valid secular purposes." *Id.* at 124. Thus, *Larkin* does not affect the Court's decision that the AFLA has a valid secular purpose.

can play a vital role in furthering secular values, a fact that even plaintiffs admit.[12] Accordingly, notwithstanding that Title VI was amended to permit religious organizations to be involved in AFLA programs, the Court finds that the AFLA was not motivated *wholly* by religious considerations but has a valid secular purpose. This does not save the AFLA, however, as it fails the other elements of the nexus text. *See* subsections B & C, *infra* pp. 26-26.

B. *On Its Face and As Applied, the AFLA Has the Primary Effect of Advancing Religion Because of Its Use of Religious Organizations for Education and Counseling of Teenagers on Matters Relating to Religious Doctrine.*

1. *The legal standard of primary effect*

As noted above, a particular statute is not immunized from further scrutiny merely because it has a valid secular purpose. *See, e.g., Grand Rapids School District v. Ball*, 105 S. Ct. 3216, 3223 (1985). A Court must then proceed to consider whether that statute comports with the remaining elements of the guidelines synthesized in *Lemon v. Kurtzman*, namely, whether it has a primary effect of advancing religion and whether it fosters excessive entanglement between government and religion. *See, e.g., id.*

[12] The plaintiffs state that "there is no doubt that religion can play an important role in advancing *secular values* of mental health, transmitting ethical values, thoughtful decision making about sexual behavior, and decreasing teenage pregnancy rates . . . ." Plaintiffs' Motion for Summary Judgment at 33. As the Senate Committee stated: "Charitable organizations with religious affiliations historically have provided social services with the support of communities and without controversy." S. Rep. No. 496, 98th Cong., 2d Sess. 10 (1984).

The second prong of the *Lemon* test requires this Court to determine whether the AFLA's "primary effect [is] one that neither advances nor inhibits religion." 403 U.S. at 612. The Court finds that the AFLA both on its face and as applied has the primary effect of advancing religion and, therefore, violates the Establishment Clause. Because the same legal principles apply both to a facial and an "as applied" inquiry, the Court will begin by setting forth the applicable law.

First, the test does not require a Court to determine which effects of the AFLA are "primary" and which less so. While comparisons are inherent in the primary effect inquiry, these need not, and should not, rise to the level of "metaphysical judgments" about the paramountcy of a statute's alleged religious effect. *See Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756, 783 n.39 (1973). As the Supreme Court has made clear,

> a law found to have a 'primary' effect [of] promot[ing] some legitimate end under the State's police power is [not] immune from further examination to ascertain whether it *also* has the direct and immediate effect of advancing religion.

Id. (emphasis added).

Subsequent decisions have illuminated the role that consideration of "direct and immediate effect" must play in the "primary effect" inquiry. Where the connection between a statute and religion is apparent from the face of the statute, and the benefit conferred upon religion is not an historical fact but a recent innovation, the Supreme Court instructs us to examine whether the statute has a "direct and immediate"

effect, or a "remote and incidental" effect, of advancing or inhibiting religion. *See, e.g., Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 710 (1985) (state law requiring employers to give employees' Sabbath off "goes well beyond having an 'incidental or remote' effect of advancing religion"); *Lynch v. Donnelly*, 465 U.S. 668, 683 (1984) (endorsement of religion effected by creche "indirect, remote, and incidental"); *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 125-26 (1982) (statute had direct effect of advancing religion by giving churches "veto" over location of bar within 100 yards of church); *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. at 783-85 (use of state tax dollars for maintenance and repair of non-public school buildings had direct and immediate effect of advancing religion). Thus, if the AFLA is such a statute, and it "directly and immediately," as opposed to "remotely and incidentally," advances religion, this Court must find that it is unconstitutional.

In contrast, where the connection to religion is not apparent on the face of the statute or from the nature of the government act itself, a court must consider whether the intended or actual beneficiary of government favor is "an institution in which religion is so pervasive that a substantial portion of its functions are [sic] subsumed in the religious mission." *Hunt v. McNair*, 413 U.S. 734, 743 (1973). If not, a court must go on to consider whether the statute "funds a religious activity in an otherwise substantially secular setting." *Id.* Thus, if the entities benefitting from AFLA funds are either "pervasively sectarian," or if the funds are not *entirely* segregated from religious activity, the government plan impermissibly advances religion and is unconstitutional. *See, e.g., id.* (revenue bonds issued by state for religiously affiliated college constitutional because college not pervasively sectarian and state-supplied money entirely segregable from religious activity).

In sum, if the connection between religion and the challenged government statute or practice is clear from the face of the statute, the Court must determine whether that statute has the "direct and immediate" effect of advancing religion. Where the connection is less obvious, the Court must consider whether the government has benefitted or burdened a pervasively sectarian institution or has funded religious activity.

To be sure, this analysis is put more neatly than the many decisions that form its base. *See supra* pp. 26-27. Particularly important for this Court's analysis of the AFLA, those decisions often mention other "sub-criteria" that pertain to both of these broad analytic constructs. First, the AFLA may not allow participants in a government-funded program to "intentionally or inadvertently inculcat[e] particular religious tenets or beliefs." *Grand Rapids School District v. Ball*, 105 S. Ct. at 3223; *see also Stone v. Graham*, 449 U.S. 39, 41-43 (1980) (per curiam); *Meek v. Pittenger*, 421 U.S. 349, 370-71 (1975); *Lemon*, 403 U.S. at 619. Such government-sponsored indoctrination is "absolutely prohibited" by the Establishment Clause. *Grand Rapids*, 105 S. Ct. at 3224; *see also, Wolman v. Walter*, 433 U.S. 229, 250 (1977); *Board of Education v. Allen*, 392 U.S. 236, 245 (1968).

Nor may AFLA programs, which involve "impressionable youngsters," such as adolescents, "provide a crucial symbolic link between government and religion, thereby enlisting, at least in the eyes of [those]

youngsters, the powers of government to the support of the religious denominations" that provides educational services. *Grand Rapids*, 105 S. Ct. at 3223-34; *see also Wolman v. Walter*, 433 U.S. 229 (1977). This symbolic link is impermissible even absent attempts to inculcate religious belief. Government funding of educational services, and the resulting identification of government with religion, violates a core purpose of the Establishment Clause if it conveys a message of government endorsement of religion in general or of a particular religion that benefits from government largesse. *Grand Rapids*, 105 S. Ct. at 3226; *see also, Lynch v. Donnelly*, 465 U.S. at 692 (O'Connor, J., concurring).

Finally, and perhaps most obviously, AFLA money cannot impermissibly subsidize "the primary religious mission" of the institutions that receive public funds. *Grand Rapids*, 105 S. Ct. at 3226; *see also, Committee for Public Education and Religious Liberty v. Regan*, 444 U.S. 646, 657 (1980); *Levitt v. Committee for Public Education and Religious Liberty*, 413 U.S. at 472; *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. at 774-81. While indirect aid of a religious mission is not *per se* impermissible, where the aid amounts to a subsidy of the religious organization, and that subsidy cannot be segregated from religious activity, the courts have declared the subsidy unconstitutional without hesitation. *Grand Rapids*, 105 S. Ct. at 3225 (state-funded "remedial" and "enrichment" programs for students in sectarian schools and on "state-leased" classrooms in sectarian schools not segregated from religious activity); *see also Wolman v. Walter*, 433 U.S. at 248-51 (state funding of unsupervised field trips and instructional material and equipment

for sectarian schools not segregated from religious activity); *Meek v. Pittenger*, 421 U.S. at 366 (state funding of instructional material for sectarian schools not segregated from religious activity).

These several related principles are the guideposts for this Court to use in considering whether the AFLA has the primary effect of advancing or inhibiting religion. It is to the AFLA itself that the Court must now turn.

2. *On its face, the AFLA has the primary effect of advancing religion because it funds teaching and counseling of adolescents by religious organizations on matters related to religious doctrine.*

The Adolescent Family Life Act is based in part on a finding of Congress that the problems of adolescent premarital sexual relations and pregnancy "are best approached through a variety of integrated and essential services provided to adolescents and their families by . . . religious . . . organizations." 42 U.S.C. § 300z(a)(8)(B). Accordingly, applicants for grants under that program must describe how they

> *will, as appropriate in the provision of services . . . (B) involve religious . . . organizations.*"

42 U.S.C. § 300z-5(a)(21)(B) (emphasis added). The "services" that these organizations must provide are the "necessary services" defined by the Act. *See id.* at § 300z-1(a)(4). Seven of the seventeen listed services explicitly involve "education" or "counseling." *Id.* at §§ 300z-1(a)(4)(A), (B), (D), (G), (H), (L) & (M). Two others involve activities intimately related to education and counseling, "outreach services to families of adolescents to discour-

age sexual relations among unemancipated minors" and "family planning services." *Id.* at § 300z-1(a)(4)(O) & (P).

Certain conclusions are immediately obvious from a reading of these provisions. First, the statute does not state that "religious organizations" shall receive AFLA grants; indeed, it is conceivable that a grantee could convince a religious organization to participate without remuneration. To intepret the religious organization's involvement in such a light is, however, to ignore both Congressional intent and the import of the statute as a whole.

The legislative history of these provisions shows without doubt that Congress intended religious organizations to participate in these programs as grantees and as paid or unpaid participants in grants awarded to other organizations. *See* S. Rep. 161, 97th Cong., 1st Sess., 15-16 (1981). Even more important, the statute, taken as a whole, explicitly permits religious organizations to be grantees and envisions a direct role for those organizations in the education and counseling components of AFLA grants. *See especially* 42 U.S.C. § 300z-5(21)(B). Thus, the Court can only conclude that this clear connection between religious organizations and the federally funded AFLA programs dictates use of the "direct and immediate" effect analysis.

Second, the statute's "direct and immediate" effect of advancing religion is easy to see from the statute's emphasis on "education" and "counseling." Put plain, these functions amount to *teaching* by grant recipients and subcontractors, including religious organizations, about the harm of premarital sexual relations and the factors supporting a choice of adoption rather than abortion, and these matters are fundamental elements of religious doctrine. More-

over, the AFLA contains no restriction whatsoever against the teaching of religion *qua* religion or any attempt to use the education and counseling process to "intentionally or inadvertently" inculcate religious belief.[13]

This may best be shown by a related, and at least equally important, section of the AFLA. That provision reads in full:

> Grants or payments may be made only to programs or projects which do not provide abortions or abortion counseling or referral, or which do not subcontract with or make any payment

[13] This absence of any statutory prohibition on inculcation of religious belief puts the AFLA in a class by itself. The Court knows of no other statutory scheme that expressly contemplates religious involvement in a government-funded program and does not attempt to segregate inculcation of religious belief from public financial support. Nor can the Court assume that such a condition exists: "where Congress intends to impose a condition on the grant of federal funds, 'it must do so unambiguously.'" *School Board of Nassau County v. Arline*, 107 S. Ct. 1123, 1132 (1987) (Rehnquist, C.J., dissenting) (*quoting Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 17 (1981)). While the Court is aware that HHS's "Notice of Grant Award" specifies that grants may not be used to "teach or promote religion," this is neither a statutory prohibition nor an official administrative regulation. It is merely an unpublished administrative warning that was written at agency discretion and can be revoked by agency fiat. No case permits a Court to find that such a discretionary statement adequately protects against sectarian use of public funds. The Court is also aware that defendant claims that HHS officials verbally advised grantees that they may not use AFLA funds to teach religion. Even if true, the fact that HHS warnings may undo some of the statute's damage does not solve the problem with the statute itself, and it is with the statute alone that a facial inquiry is concerned.

> to any person who provides abortions or abortion counseling or referral, except that any such program or project may provide referral for abortion counseling to a pregnant adolescent if such adolescent and the parents or guardians of such adolescent request such referral; and grants may be made only to projects or programs which do not advocate, promote, or encourage abortion.

Id. at § 300z-10.

It is a fundamental tenet of many religions that premarital sex and abortion are wrong, even sinful. *See United States v. Dykema*, 666 F.2d 1096, 1104 (7th Cir. 1981), *cert. denied*, 456 U.S. 983 (1982) (judicial notice taken of religious beliefs); *United States v. Kahane*, 396 F. Supp. 687, 692 (E.D.N.Y.), *aff'd and modified on other grounds*, 527 F.2d 492 (2d Cir. 1985) (same); *see also Memorandum in Support of Plaintiff's Motion for Summary Judgment*, at 22. The AFLA does not prohibit these religions from receiving AFLA grants. Thus, by contemplating the provision of aid to organizations affiliated with these religions—aid for the purpose of encouraging abstinence and adoption—the AFLA contemplates subsidizing a fundamental religious mission of those organizations.

To presume that AFLA counselors from religious organizations can put their beliefs aside when counseling an adolescent on matters that are part of religious doctrine is simply unrealistic. *See, e.g., Grand Rapids*, 105 S. Ct. at 3225. Even if it were possible, government would tred impermissibly on religious liberty merely by suggesting that religious organizations instruct *on doctrinal matters* without any conscious or unconscious reference to that doctrine. Moreover, the statutory scheme is fraught with the

possibility that religious beliefs might infuse instruction and never be detected by the impressionable and unlearned adolescent to whom the instruction is directed. *This possibility alone amounts to an impermissible advancement of religion. Grand Rapids*, 105 S. Ct. at 3225. And the danger here is far greater than in *Grand Rapids*, which involved classroom education, as the AFLA contemplates one-on-one counseling, a situation in which there are few discernable constraints. The possibility that religious organizations will exert pressure on "matters sacred to conscience" is inherent in this counseling, and it renders the program invalid. *See McCollum v. Board of Education*, 333 U.S. 203, 227 (1948) (Frankfurter, J., concurring); *see also Engel v. Vitale*, 370 U.S. 421, 431 (1962).

Similarly, the involvement of religious organizations in counseling and education on premarital sex, abstinence, and the preferability of adoption to abortion creates a "crucial symbolic link" between government and religion when the counseling is funded by the public fisc. This symbolic link is quite strong where the education is directed at adolescents, especially pregnant adolescents who may be in a delicate and more than ordinarily receptive state of mind. And it is particularly strong where, as here, the subjects taught are, in the hands of a "religious organization," inescapably infused with religious beliefs. *See, e.g., Grand Rapids*, 105 S. Ct. at 3226; *McCollum v. Board of Education*, 333 U.S. at 227; *Felton v. Secretary of Education*, 739 F.2d 48, 67-68 (2d Cir. 1984), *aff'd sub nom., Aguilar v. Felton*, 473 U.S. 402 (1985).

In short, the AFLA on its face has the primary effect of advancing religion. This alone would force the Court to declare the law constitutionally infirm.

But, as noted above, because Establishment Clause case law has not always neatly demarcated a facial challenge from a challenge to a law as applied, this Court will consider whether the AFLA, as applied, has the primary effect of advancing or inhibiting religion.

3. *As applied, the AFLA has the primary effect of advancing religion.*

The undisputed record before the Court transforms the inherent conflicts between the AFLA and the Constitution into reality.[14] These facts reveal that

[14] To support their summary judgment motion, plaintiffs prepared a three-volume, four-hundred page "Statement of Undisputed Material Facts" that quoted extensively from the exceptionally large record in this case and cited to the exact place in the record where each quotation could be found. Such a statement is precisely what our local rules and the more generally applicable federal rules of summary judgment law require. Defendant's response to plaintiffs' submission was also lengthy, but the difference in content was significant. Most of defendant's "disputes" of plaintiffs' facts were unsupported disagreements, complaints that a quote had been taken out of context, or the word "dispute" with a reference to the page in the multi-volume record at which the Court could look up an undescribed disagreement and decide for itself whether the effort was worthwhile. Defendant also "controverts" some of plaintiffs' facts with "declarations to be supplied later." The Court knows of no such later-filed declarations, and the docket sheets retained by the Clerk or the Court do not show that these declarations were supplied. It should go without saying that such a "response" does not comport with the command of Local Rule 108-h, formerly Local Rule 1-9(i), which states that an opposition to a summary judgment motion "shall be accompanied by a separate concise statement of genuine issues *setting forth all material facts* as to which it is contended there exists a genuine issue necessary to be litigated . . . ." (emphasis added). The Rule adds that a fact is to be taken as admitted unless properly controverted. The Court has done precisely that. It regards as "disputed" all facts pointed to by plaintiff and disputed on the basis of identified evidence in the record that actually makes the point claimed by defendant. As Rule 108-h requires, the Court takes as uncontroverted all other facts pointed to by plaintiffs. *See, e.g., Catrett v. Johns-Manville Sales Corp.*, 756 F.2d 181, 190 (D.C. Cir. 1985) (Bork, J., dissenting) ("So long as the plaintiff has even one iota of weak inferential evidence, defendants will have the burden of affirmatively attacking that evidence to prove that there is no factual dispute suitable for trial."), *rev'd sub nom. on other grounds Celotex Corp. v. Catrett*, 106 S. Ct. 2548 (1986).

AFLA grantees and subgrantees have included several organizations with institutional ties to religious denominations and corporate requirements that the organizations abide by and not contradict religious doctrines. In addition, other recipients of AFLA funds, while not explicitly affiliated with a religious denomination, are religiously inspired and dedicated to teaching the dogma that inspired them. While the Court will not engage in an exhaustive recitation of the record, references to representative portions of the record reveal the extent to which the AFLA has in fact "directly and immediately" advanced religion, funded "pervasively sectarian" institutions, or permitted the use of federal tax dollars for education and counseling that amounts to the teaching of religion.

Consider first St. Margaret's Hospital, a self-described "Christian institution" committed to acting "in harmony with the teaching of the Catholic Church." Plaintiffs' Facts, Volume 3, St. Margaret's, ¶ 7. At least one AFLA-funded employee of St. Margaret's was told that she must follow the directives set forth in "Ethical and Religious Directives of

Catholic Facilities." *Id.* at ¶¶ 7, 10. Similarly, subgrantees of St. Ann's Infant and Maternity Home, which are affiliated with the Catholic Archdiocese of Washington, may not counsel or refer patients for abortions; nor do they encourage any method of birth control not permited by Catholic doctrine. *Id.* at Volume 1, St. Ann's, ¶¶ 11, 33. Significantly, these subgrantees are solely responsible for the family planning component of St. Ann's AFLA program, so the church-directed restrictions on counseling are highly pertinent. *Id.* at ¶ 24. Moreover, the projects are directed by members of religious orders, which base their curriculum on materials with explicitly religious content.[15] *Id.* at ¶¶ 76-77.

Similarly, among the "purposes" listed in the Articles of Incorporation of Lutheran Family Services is:

> To promote the extension of the kingdom of God through compassionate Christian love and to aid the Lutheran Church in Iowa to fulfill their responsibilities of compassion and love . . . . To promote the general welfare of children, families and individuals within the realistic resources of the corporation, . . . and *the teachings of the Lutheran Church.*

Id. at Lutheran Family Services, ¶ 3 (emphasis added).

All told, the record reveals that at least ten AFLA grantees or subgrantees were themselves "religious

[15] The Court understands that there is a dispute as to whether this religious material was taught, but there is no dispute that the curriculum that was taught was at least based on these materials, which spoke in terms of Church teachings on sexual matters and contained several references to God. *See* Volume 1, St. Ann's, ¶¶ 76-77.

organizations" in the sense that they have explicit corporate ties to a particular religious faith and bylaws or policies that prohibit any deviation from religious doctrine.[16] The religious character of other AFLA grantees or subgrantees is not as explicit but is nonetheless indisputable.

Family of the Americas Foundation ("FAF"), for instance, is an affiliate of "WOOMB-International," an organization without discernable religious ties. But WOOMB's "Aims and Objectives" states that the organization was "inspired by the Encyclical *Humane Vitae*," *id.* at FAF ¶ 8, the papel encyclical setting forth Catholic dogma on birth control and abortion. Publications used by, published by, and conferences sponsored by the Family of the Americas Foundation have largely been devoted to explicating the doctrine set forth by the *Humane Vitae* as well as other religious precepts. Plaintiff's Facts, Volume 2, FAF, ¶¶ 36-51, 66-75, 85, 88-96, 103, 109. Indeed, FAF's Executive Director has stated that she "reports" to the Pope on behalf of the organization. *Id.* at ¶ 13. Other documents buttress this connection between FAF and the Catholic Church. *Id.* at ¶¶ 16-17.

These explicit or implicit corporate policies might give less pause with respect to a federal program that

[16] These organizations are: (Plaintiff's Facts, Volume 1): St. Ann's Infant and Maternity Home; Center for Life of Providence Hospital, Washington, D.C.; Catholic Charities of Washington, D.C.; (Plaintiff's Facts, Volume 2): Family Life Bureau of the Diocese of St. Cloud, Mn.; Catholic Charities of the Diocese of Arlington, Va.; Catholic Family Services of Amarillo, Tx.; Catholic Family Services of Wayne County, Mich.; (Plaintiff's Facts, Volume 3): St. Margaret's Hospital; Catholic Social Services of SW Ohio; Lutheran Family Services.

did not implicate religious tenets. But the situation here is quite different. Because these religious organizations use federal funds to educate or counsel on matters inseparable from religious dogma, the constitutional implications of the grants are clear and clearly troubling: the inescapable conclusion is that federal funds have been used by pervasively sectarian institutions to teach matters inherently tied to religion.

The record demonstrates that some grantees have included explicitly religious materials, or a curriculum that indicates an intent to teach theological and secular views on sexual conduct, in their HHS-approved grant proposals. *E.g.*, Plaintiff's Facts, Volume 2, Catholic Charities of the Diocese of Arlington, ¶ 17; *Id.*, Search Institute, ¶¶ 24, 32; *Id.* at Volume 3, St. Margaret's, ¶¶ 29, 86-90, 113. One such application, which was funded for one year, included a program designed, *inter alia*, "to communicate the Catholic diocese, Mormon (Church of Jesus Christ of Latter Day Saints) and Young Buddhist Association's approaches to sex education." *Id.*, Maternal and Child Health Department of Health [sic] ¶ 2.

Nor do the facts suggest that the programs in operation cured the First Amendment problems evident from these approved grant applications. At least one grantee actually included "spiritual counseling" in its AFLA program. *Id.*, SUMA, ¶ 16. Other AFLA programs used curricula with explicitly religious materials. *E.g.*, *id.*, St. Margaret's ¶¶ 86-90; Camden County ¶¶ 8, 15. In addition, a very large number of AFLA programs took place on sites adorned with religious symbols—*precisely* the "crucial symbolic link" between religion and government that Establishment Clause jurisprudence has cautioned against, particularly where youngsters are involved. *E.g.*, *id.* at Volume 2, Catholic Charities of Arlington, ¶¶ 43-45, 49; CASI, ¶¶ 22-23, 28-30; Volume 3, St. Margaret's, ¶ 24; Lyon County, ¶¶ 23-24.[17]

Similarly, the record reveals that some grantees attempted to evade restrictions they perceived on AFLA-funded religious teaching by establishing programs in which an AFLA-funded staffer's presentations would be immediately followed, in the same room and in the staffer's presence, by a program presented by a member of a religious order and dedicated to presentation of religious views on the subject covered by the AFLA staffer. *E.g.*, *id.* at Volume 2, Catholic Charities of the Diocese of Arlington, ¶¶ 102-119, 132-40. This transparent attempt to isolate the sectarian from the secular is unconvincing; indeed, the joint presence of denominational personnel and federally funded employees reinforces the impermissible symbolic tie, if not an actual tie, between government and religion. *See, e.g.*, *Grand Rapids*, 105 S. Ct. at 3226; *Larkin v. Grendel's Den, Inc.*, 459 U.S. at 125-26.

Equally disturbing, the overwhelming number of comments shows that program participants believed that these federally funded programs were also sponsored by the religious denomination. *E.g.*, Plaintiff's

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[17] Throughout its "Statements" in response to plaintiffs' Rule 108-h submissions, defendant terms "irrelevant" the fact that AFLA programs were held in rooms full of religious symbols. Defendant is quite wrong: nothing could be clearer than the Establishment Clause's prohibition against locating publicly funded classes in rooms with religious symbols and other religious decorations. *See, e.g., Aguilar v. Felton*, 473 U.S. 472 (1985); *Wolman v. Walter*, 433 U.S. 229 (1977); *Hunt v. McNair*, 413 U.S. 734 (1973); *Tilton v. Richardson*, 403 U.S. 672 (1971).

Facts, Volume 3, Lutheran Family Services, ¶ 21; Northwest Louisiana Adolescent Family Life Project, ¶¶ 6-8. This appearance of joint action provides a significant symbolic benefit to religion altogether at odds with the First Amendment's demand of scrupulous neutrality between religion and non-religion. *E.g., Larkin*, 459 U.S. at 125-26; *Everson v. Board of Education*, 330 U.S. 1, 8-13 (1947).

In sum, the facts demonstrate beyond peradventure the effect of the Adolescent Family Life Act programs. The Act creates an explicit connection between a state-sponsored program, a religiously identified organization, and either a religious-inspired curriculum or a classroom replete with religious symbols. *See supra* pp. 34-37. Such a relationship inescapably amounts to the "significant symbolic benefit to religion" that government may not bestow. *Larkin*, 459 U.S. at 125-26. Moreover, to the extent that AFLA grantees were religious organizations that used AFLA grants to "educate" or "counsel" on the basis of a religious or religiously inspired curriculum, *see supra* pp. 39-40, the funds went to sectarian institutions for purposes indistinguishable from their religious aims.

In short, defendant has approved AFLA grants and distributed AFLA funds in a manner that advances religion, regardless of whether one looks for a "direct and immediate effect" of advancing religion, a benefit to a "pervasively sectarian" institution, or the use of tax dollars to "teach" religion. Accordingly, the Court has no choice but to find that the Adolescent Family Life Act, on its face and as applied, has the effect of impermissibly advancing religion and thereby violates the First Amendment of the Constitution.

C. *Because Organizations Funded by the AFLA Have a Religious Character and Purpose, and the AFLA Programs Concentrate on Counseling and Education, the Degree of Government Monitoring Necessary to Prevent Grantees From Advancing Religion Would Necessarily Rise to the Level of Excessive Entanglement.*

Although the AFLA's primary effect of advancing religion renders it unconstitutional both on its face and as applied, the Court will also consider the statute's proclivity for fostering excessive entanglement between church and state. On that ground alone, the AFLA is unconstitutional on its face.

To determine whether a statute fosters excessive entanglement, the Court must examine three factors: 1) the character and purpose of the institutions benefitted; 2) the nature of the aid; and 3) the nature of the relationship between the governmental and religious organization. *See Lemon v. Kurtzman*, 403 U.S. 602, 614-15, 622 (1971). Each of these factors is *indicative*, but not dispositive, of the relationship between government and religion. *See Lemon*, 403 U.S. at 614-15, 622. Because the entanglement analysis looks at this relationship as a whole, no one factor is controlling. *See Tilton v. Richardson*, 403 U.S. 672, 688 (1971). Thus, the Court will consider each of these factors in order to examine the AFLA's potential for excessive entanglement between government and religion.

Looking only at the AFLA's definition of "eligible grant recipient," which is a "public or nonprofit private organization or agency," 42 U.S.C. § 300z-1(a)(3), that section of the AFLA, standing alone, does not seem to offend the Establishment Clause. Section 300z-5(21)(B) of the AFLA, however, further de-

fines what types of institutions the AFLA benefits by explicitly requiring applicants to describe how they will involve "*religious organizations*" in their programs. 42 U.S.C. § 300z-5(21)(B) (emphasis added). Moreover, it is not disputed that a number of religious organizations are not only involved in AFLA programs but are grant recipients. *See supra* pp. 31-42. Thus, the AFLA permits the involvement of religious organizations and has, in fact, involved such organizations. *See id.*

The character and purpose of "religious organizations" is self-evident. The definition of "religious organizations" so clearly means organizations with a religious character and purpose that "one would necessarily need to consult a lawyer to effectively misconstrue it." *Logan v. United States*, 518 F.2d 143, 152 (6th Cir. 1975). Even if the Court were to go beyond the face of the statute and examine the organizations that have in fact received AFLA funding, the Court would have to conclude, as would be expected, that the "religious organizations" that have received AFLA funding have a religious character and purpose. *See supra* pp. 31-42. Because these organizations have a religious character and purpose, the risk that AFLA funds will be used to transmit religious doctrine can be overcome only by government monitoring so continuous that it rises to the level of excessive entanglement. *See Lemon*, 403 U.S. at 615-16.

The AFLA provides monetary grants that are used largely for broadly described counseling-type services. *See* 42 U.S.C. § 300z-1(a)(4); *supra* p. 9. Such services "have a substantially different ideological character" from "secular, neutral, or nonideological services, facilities, or materials." *Lemon*, 403 U.S. at

616-17. The opportunity and potential for furthering religion by giving religious organizations money to provide counseling-related services is great, particularly since this counseling involves teenagers. *Cf. Lemon*, 403 U.S. at 617. As the Supreme Court noted in *Lemon*:

> A textbook's content is ascertainable, but a [counselor's] handling of a subject is not. We cannot ignore the danger that a [counselor] under religious control and disciplines poses to the separation of the religious from the purely secular. . . . The conflict of the functions inheres in the situation.

403 U.S. at 617. Thus, considering the AFLA as a whole, the nature of the aid creates the danger that AFLA funds flowing to religious organizations will inescapably advance religion absent continual government monitoring, which the Establishment Clause forbids.

The final factor for the Court to consider in determining whether the AFLA fosters an excessive entanglement between government and religion is the nature of the relationship between the government and the AFLA-funded religious organization. *See Lemon*, 403 U.S. at 615. Because AFLA funds are used largely for counseling, to ensure that religion is not advanced would require extensive and continuous monitoring and direct oversight of every counseling session.

While extensive and continuous monitoring might prevent AFLA grantees from advancing religion, such monitoring would be impermissible in this case. *See Aguilar v. Felton*, 473 U.S. 472 (1985); *Lemon*,

403 U.S. at 619. Wherever state-funded teaching by religious organizations is involved,

> a comprehensive, discriminating, and continuing state surveillance will inevitably be required to ensure that . . . the First Amendment . . . is respected. Unlike a book, [however,] a [counselor] cannot be inspected once so as to determine the extent and intent of his or her personal beliefs and subjective acceptance of the limitations imposed by the First Amendment. These prophylatic contacts will involve excessive and enduring entanglement between state and church.

E.g., *Lemon*, 403 U.S. at 619; *Aguilar*, 473 U.S. at 472; *Meek v. Pittenger*, 421 U.S. 349, 352-53 (1975); *Tilton*, 403 U.S. at 672; *Hunt v. McNair*, 413 U.S. 734, 746-49 (1973).

By virtue of the foregoing, it is impossible to comprehend entanglement more extensive and continuous than that necessitated by the AFLA. Therefore, the Court can only conclude that such entanglement would be excessive.

In sum, a consideration of the institutions benefitted, the nature of the aid, and the nature of the relationship between government and AFLA-funded religious organizations forces the Court to conclude that the AFLA, on its face, fosters excessive entanglement between government and religion. The AFLA funds counseling-type services whose specific content may be determined by the religious organization itself. Counseling inherently involves teaching and, therefore, implicates the Court's concerns about the inability to segregate the religious from the secular without an impermissible entanglement between

church and state. Indeed, because counseling is often done one-on-one, it is even more susceptible than teaching to the intentional or inadvertant advancement of religion. Although continual monitoring might make it appear that religion is not advanced, such monitoring would surely rise to the level of excessive entanglement between government and religion.

Moreover, AFLA grantees can be and are organized with express ties to religion. The religious character and purpose of the organizations funded makes them "a powerful vehicle for transmitting" religion. *Lemon*, 403 U.S. at 616. This potential for inculcating religious doctrine in the provision of counseling services is enhanced by the impressionable age of the adolescents to be helped by AFLA programs. *See id.* Therefore, the Court finds that the AFLA fosters excessive entanglement that is impermissible under the Constitution and is detrimental to government and religion.

D. *Because the AFLA Funds Religious Organizations to Provide Services Intrinsically Related to Fundamental Beliefs Upon Which Religions and Politicians Strongly Disagree, the AFLA is Likely to Incite Political Division.*

Although political divisiveness has never been the only ground for holding a statute unconstitutional, a statute that creates political division along religious lines is more likely to offend the Establishment Clause than one that does not. *See, e.g.*, *Lynch*, 465 U.S. at 689 (O'Connor, J., concurring); *Meek*, 421 U.S. at 370-73; *Lemon*, 403 U.S. at 622-24; *Nyquist*, 413 U.S. at 796-99. The AFLA addresses very sensitive problems on which religions have important, even

central, doctrines. For instance, the AFLA prohibits mention of abortion and encourages abstinence from premarital sex. The AFLA permits religious organizations to use government funds to provide care and counseling services related to these sensitive issues upon which religions' fundamental beliefs differ. *See supra* p. 33. Such differences on fundamental beliefs tend to incite political division along religious lines. "[M]any people confronted with issues of this kind will find their votes aligned with their faith." *Lemon*, 403 U.S. at 622. Political division along religious lines was one of the evils against which the Establishment Clause was intended to protect. *Id.* Moreover, because AFLA funds are appropriated on an annual basis, the political fragmentation and divisiveness caused by the AFLA will be recurring and intensified. *See id.* at 623. Although the political division caused by the AFLA may not be sufficient to invalidate it, it is indicative of the problems caused when religion is involved in programs of this nature.

VII. *CONCLUSION*

This Court is certain that the Adolescent Family Life Act emanates from well-founded and benign intentions. It is equally convinced that much of the AFLA has a laudable purpose. But the purposes of the statute are not the only issue before the Court. The critical issue is whether the AFLA, and the manner in which it is implemented by HHS, violates the Establishment Clause of the First Amendment.

The Establishment Clause, in the words of Thomas Jefferson, erects a "wall of separation" between church and state. *See Everson v. Board of Education*, 330 U.S. 1, 16 (1947). This wall exists not specifically to bar programs such as the AFLA but for a larger purpose: to protect the sanctity and freedom of all religions, regardless of their beliefs and practices. Although cooperation between government and religion to further mutually agreeable objectives may seem harmless, such cooperation may take on an intrusive and unwelcome color when conflicts arise between government directives and religious beliefs. History shows the necessity of protecting religion from government.

There will always be some who see no harm in utilizing the Executive branch to monitor religious organizations and some whose own religious beliefs are more likely than not to coincide with the beliefs given a governmental imprimatur. But there will always be others in our pluralistic society whose religious beliefs are out of harmony with the government-approved view and who may not be able to hold fast to their beliefs in the face of government involvement. For, as the Supreme Court noted, "when the power, prestige, and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain." *Engel v. Vitale*, 370 U.S. 421, 431 (1962). Equally plain, a society is only truly free when individuals are left free from direct or indirect pressure to abandon their own cherished religious beliefs for whatever set of beliefs currently holds government favor. As a result, it is essential that we scrupulously adhere to Jefferson's vision and protect religion from government intrusion, whether the intrusion is obviously malignant or seemingly benign.

Upon examination of the language of the Adolescent Family Life Act, the Court finds that on its face

the AFLA has the primary effect of advancing religion and fosters excessive entanglement between government and religion. Moreover, the uncontroverted facts show, without a doubt, that as applied the AFLA has the primary effect of advancing religion. Accordingly, this Court has no choice but to find the AFLA unconstitutional on its face and as applied.

By virtue of the foregoing, the Court will issue an Order, of even date herewith, declaring that the Adolescent Family Life Act is unconstitutional both on its face and as applied, at least insofar as the statute involves "religious organizations" in AFLA programs. As a result of this determination, the Court will in that Order enjoin all funding of "religious organizations" under the AFLA. In light of the Court's decision, the Court has also ordered the parties to provide the Court with additional briefing and guidance as to whether, in light of *Alaska Airlines, Inc. v. Brock*, 55 U.S.L.W. 4396 (Mar. 25, 1987), the constitutionally infirm sections of the Act pertaining to "religious organizations" are severable from the Act as a whole. Upon receipt of those briefs, the Court will determine whether a hearing is necessary on the issue of severability and whether there are remaining issues relating to remedies for the Court to consider.

/s/ Charles R. Richey
CHARLES R. RICHEY
United States District Judge

April 15, 1987
Date

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

C.A. No. 83-3175

CHAN KENDRICK, REVEREND ROBERT E. VAUGHN, REVEREND LAWRENCE W. BUXTON, DR. EMMETT W. COCKE, JR., SHIRLEY PEDLER, REVEREND HOMER A. GODDARD, JOYCE ARMSTRONG, JOHN ROBERTS and THE AMERICAN JEWISH CONGRESS, PLAINTIFFS

v.

DR. OTIS R. BOWEN, JR., Secretary of the Department of Health and Human Services, DEFENDANT

and

SAMMIE J. BRADLEY, KATHERINE K. WARNER and UNITED FAMILIES OF AMERICA,
DEFENDANT-INTERVENORS

[Filed April 15, 1987]

ORDER

In accordance with the Opinion in the above-captioned case, issued of even date herewith, and for the reasons set forth therein, it is this 15th day of April, 1987,

ORDERED that plaintiffs' motion for a declaratory judgment that the Adolescent Family Life Act is unconstitutional on its face and as applied only

insofar as religious organizations are involved in carrying out the programs and purposes of the Act, shall be, and hereby is, granted; and, it is

FURTHER ORDERED that plaintiffs' motion for an injunction prohibiting all funding be, and hereby is, granted only as it pertains to "religious organizations" under the Adolescent Family Life Act; and, it is

FURTHER ORDERED that defendant's and defendant-intervenors' motions shall be, and hereby are, denied consistent with this Order and the Opinion of even date herewith; and, it is

FURTHER ORDERED that the parties shall submit additional briefs addressing only whether the constitutionally infirm language pertaining to the use of "religious organizations" under the Adolescent Family Life Act is severable in light of *Alaska Airlines, Inc. v. Brock*, 55 U.S.L.W. 4396 (Mar. 25, 1987) and cases cited therein to the effect that absent a severability (separable) clause, apparently not present here, there is no presumption against severability, as well as the rule of law that

> "[A] court should refrain from invalidating more of the statute than is necessary. . . . ['W]henever an act of Congress contains unobjectionable provisions separable from those found to be unconstitutional, it is the duty of this court to so declare, and to maintain the act insofar as it is valid.'" *Regan v. Time, Inc.*, 468 U.S. 641, 652 (1984) (plurality opinion), quoting *El Paso & Northeastern R. Co. v. Gutierrez*, 215 U.S. 87, 96 (1909).

and the principle of law that

> . . . "'Unless it is evident that the Legislature would not have enacted those provisions which

> are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law.'" *Buckley v. Valeo*, 424 U.S. 1, 108 (1976) (*per curiam*), quoting *Champlin Refining Co. v. Corporation Comm'n of Oklahoma*, 286 U.S. 210, 234 (1932). *Accord*: *Regan v. Time, Inc.*, 468 U.S., at 653; *INS v. Chadha*, 462 U.S. at 931-932; *United States v. Jackson*, 390 U.S. 570, 585 (1968). *Id.* at 4398; and, it is

FURTHER ORDERED that any such briefs must be submitted to the Clerk of this Court within thirty business days of the date of this Order and any replies thereto shall be due within ten business days after such briefs are filed; and, it is

FURTHER ORDERED that, upon receipt of these briefs, the Clerk of the Court shall notify the parties if oral argument on the issue of severability is required.

/s/ Charles R. Richey

CHARLES R. RICHEY
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 83-3175

CHAN KENDRICK, REVEREND ROBERT E. VAUGHN, REVEREND LAWRENCE W. BUXTON, DR. EMMETT W. COCKE, JR., SHIRLEY PEDLER, REVEREND HOMER A. GODDARD, JOYCE ARMSTRONG, JOHN ROBERTS and THE AMERICAN JEWISH CONGRESS, PLAINTIFFS

v.

DR. OTIS R. BOWEN, JR., Secretary of the Department of Health and Human Services, DEFENDANT

and

SAMMIE J. BRADLEY, KATHERINE K. WARNER and UNITED FAMILIES OF AMERICA,
DEFENDANT-INTERVENORS

[Filed May 22, 1987]

ORDER

Defendant and defendant-intervenors have moved this Court to stay its Order of April 15, 1987. Upon consideration of the motion and the affidavits sub-

mitted by the defendant, the opposition filed thereto, and the arguments made by the parties in open court, the Court finds that a limited stay is appropriate and proper. Accordingly, it is, by the Court, this 22 day of May, 1987,

ORDERED that the Court's Order of April 15, 1987 be and hereby is stayed only to the extent that it enjoins funding of *current* AFLA grantees that are "religious organizations"; and it is

FURTHER ORDERED that this stay shall only be effective up to and including the last day of the current grant cycle, which the Court has been advised is September 30, 1987.

/s/ Charles R. Richey
CHARLES R. RICHEY
United States District Court

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 83-3175

CHAN KENDRICK, REVEREND ROBERT E. VAUGHN,
REVEREND LAWRENCE W. BUXTON,
DR. EMMETT W. COCKE, JR.,
SHIRLEY PEDLER, REVEREND HOMER A. GODDARD,
JOYCE ARMSTRONG, JOHN ROBERTS AND
THE AMERICAN JEWISH CONGRESS, PLAINTIFFS,

v.

DR. OTIS R. BOWEN, JR.,
SECRETARY OF THE DEPARTMENT OF HEALTH
AND HUMAN SERVICES, DEFENDANT

AND

SAMMIE J. BRADLEY,
KATHERINE K. WARNER AND
UNITED FAMILIES OF AMERICA, DEFENDANT-INTERVENORS.

[FILED AUG. 13, 1987]

ORDER

I. SEVERABILITY

On April 15, 1987, this Court rendered an Opinion and entered an Order and Judgment holding that the Adolescent Family Life Act ("AFLA"), 42 U.S.C. §§ 300z to

300z-10, is unconstitutional on its face and as applied insofar as religious organizations are involved in carrying out the programs and purposes of the Act. *See Kendrick* v. *Bowen*, 657 F. Supp. 1547, 1551 (D.D.C. 1987). Pursuant to the April 15, 1987 Order of the Court the parties submitted briefs on the issue of whether the constitutionally infirm language of the AFLA, namely its references to "religious organizations," is severable from the Act in light of the Supreme Court's decision in the case of *Alaska Airlines, Inc.* v. *Brock*, 107 S. Ct. 1476 (1987). On August 11, 1987, after all parties had an opportunity to brief the issue of severability, the Court held oral argument. Upon consideration thereof and the entire record herein, the Court finds that the AFLA's references to "religious organizations" are severable from the statute and that the remainder of the AFLA is fully operable as law in a manner consistent with the intent of Congress.

The absence of a severability clause in the AFLA does not create a presumption for or against severability. *E.g.*, *Alaska Airlines*, 107 S. Ct. at 1481. In carrying out its duty to "refrain from invalidating more of the [AFLA] than is necessary," the Court must sever the AFLA's references to "religious organizations" if what is left is fully operative as law and will function in a manner consistent with the intent of Congress. *Id.* at 1480-81.

When Congress enacted the AFLA, its purpose was to alleviate the problem of teenage pregnancy. 42 U.S.C. § 300z(b); *Kendrick*, 657 F. Supp. at 1558-60. The involvement of religious organizations was just one means of addressing this problem and not the primary reason why Congress enacted the AFLA. The AFLA refers to "religious organizations" only four times, and in only one instance, where grant applicants must describe how they

> will . . . involve families . . . religious and charitable organizations, voluntary associations, and other groups . . .

42 U.S.C. § 300z-5(a)(21), is a reference to "religious organizations" made in the operative part of the statute. Thus, religious organizations are just one of many entities that Congress wanted to be involved in combatting the problem of teenage pregancy. 42 U.S.C. § 300z(b); *Kendrick*, 657 F. Supp. at 1558-60.

There is nothing in the record before the Court to suggest that the intent of Congress to alleviate the problem of teenage pregnancy cannot be effectively carried out without the direct involvement of religious organizations. Indeed, religious organizations are mentioned only once in the entire legislative history. There are numerous secular organizations that can fulfill the AFLA's purpose without transcending the seperation [*sic*] of church and state required by the Establishment Clause.

Thus, the Court finds that both the express language of the AFLA and its legislative history establish that Congress would have enacted the AFLA without its references to "religious organizations." Absent those references the primary purposes of the AFLA can continue to be accomplished. *Alaska Airlines*, 107 S. Ct. 1480-81. Moreover, the AFLA is fully and constitutionally operative as law in a manner consistent with the intent of Congress absent its references to "religious organizations." *Id.*

II. DEFENDANT'S RULE 59(e) MOTION

The remaining matter pending before the Court is defendant's Rule 59(e) motion. Specifically, defendant moves this Court to define "religious organizations," to clarify whether religious organizations awarded grants prior to this Court's injunction may receive previously awarded funds that have yet to be distributed, and what current grantees constitute "religious organizations." The Court is puzzled that defendant has asked it to define the term "religious organization" when defendant applied this

term on a regular basis in awarding grants under the AFLA. Nevertheless, the Court has reviewed its Order of April 15, 1987 and finds that the language of the Order is clear. Moreover, as plaintiffs have demonstrated, the Court referred to the term "religious organization" numerous times throughout its Opinion (seventeen by plaintiff's count). There is also ample precedent in numerous statutes and federal regulations defining the term "religious organizations." Finally, to the extent that defendant seeks clarification in order to abide by this Court's injunction, that problem is now moot in light of the Supreme Court's recent stay of said injunction.

Accordingly, it is, by the Court, this 13th day of August, 1987,

ORDERED that the term "religious organization" is hereby severed from the AFLA in all places that it appears; and, it is

FURTHER ORDERED that defendant's Rule 59(e) motion is hereby denied; and, it is

FURTHER ORDERED that this case is dismissed from the docket of this Court.

/s/ CHARLES R. RICHEY

Charles R. Richey
United States District Judge

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 83-3175

CHAN KENDRICK, ET AL., PLAINTIFFS

v.

DR. OTIS R. BOWEN, JR., Secretary of the Department of Health and Human Services, DEFENDANT

and

SAMMIE J. BRADLEY, ET AL., DEFENDANT-INTERVENORS

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given this 15th day of May, 1987, that defendant Dr. Otis Bowen, Jr., Secretary of Health and Human Services, hereby appeals to the Supreme Court of the United States from the order of this Court entered April 15, 1987, in favor of plaintiffs.

This appeal is taken pursuant to 28 U.S.C. § 1252 and 28 U.S.C. § 2101(a).

Respectfully submitted,

RICHARD K. WILLARD
Assistant Attorney General

JOSEPH E. DIGENOVA
United States Attorney

APPENDIX F

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 83-3175 CRR

CHAN KENDRICK, ET AL., PLAINTIFFS,

v.

DR. OTIS R. BOWEN, JR.,
SECRETARY OF THE DEPARTMENT OF HEALTH
AND HUMAN SERVICES; DEFENDANT,

AND

SAMMIE J. BRADLEY, ET AL., DEFENDANT-INTERVENORS.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given this 20th day of August, 1987, that defendant, Dr. Otis R. Bowen, Jr., Secretary of Health and Human Services, hereby appeals to the Supreme Court of the United States from the final judgment of this Court entered August 13, 1987.

This appeal is taken pursuant to 28 U.S.C. § 1252 and 28 U.S.C. § 2101(a).

Respectfully submitted,

RICHARD K. WILLARD
Assistant Attorney General

JOSEPH E. DIGENOVA,
United States Attorney

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No. 87-431

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES,

Appellant

v.

CHAN KENDRICK, *et al.*

On Appeal from the United States District Court for the District of Columbia

MEMORANDUM FOR APPELLEE UNITED FAMILIES OF AMERICA IN SUPPORT OF APPELLANT

MICHAEL W. MCCONNELL
1111 E. 60th St.
Chicago, IL 60637
(312) 702-3306
Counsel of Record

EDWARD R. GRANT
CLARKE D. FORSYTHE
AMERICANS UNITED FOR LIFE LEGAL DEFENSE FUND
343 S. Dearborn St., Rm. 1804
Chicago, IL 60604
(312) 786-9494

PAUL ARNESON
1701 Pennsylvania Ave., Suite 940
Washington, D.C. 20006
(202) 785-0530

MICHAEL J. WOODRUFF
MICHAEL A. PAULSEN
c/o CENTER FOR LAW & RELIGIOUS FREEDOM
P.O. Box 1492
Merrifield, VA 22116
(703) 560-7314

October 16, 1987

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IN THE

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Appellant

v.

CHAN KENDRICK, *et al.*

On Appeal from the United States District Court for the District of Columbia

---

MEMORANDUM FOR APPELLEE UNITED FAMILIES OF AMERICA IN SUPPORT OF APPELLANT

This is an appeal, pursuant to 28 U.S.C. 1252, from a final order of the district court issued August 13, 1987. J.S. App. 52a-55a. This order incorporates an earlier interlocutory decision, rendered April 15, 1987, that the Adolescent Family Life Act, 42 U.S.C. (& Supp. III) 300z *et seq.* (the "AFLA"), is unconstitutional insofar as it involves "religious organizations" in its programs. J.S. App. 46a. The final order additionally holds that the AFLA's references to "religious organizations" and the involvement of religious organizations in the program are severable from the remainder of the statute, and denies

the government's motion, under Fed. R. Civ. P. 59(e), for clarification of the term "religious organizations."

On behalf of appellant, the Secretary of Health and Human Services, the Solicitor General has filed two jurisdictional statements raising identical issues, one (No. 87-253) from the interlocutory order of April 15, 1987, the other (this appeal, No. 87-431) from the final order. In addition, plaintiffs Chan Kendrick, *et al.*, have filed a conditional cross-appeal (No. 87-462).*

Appellee United Families of America is an organization with members who are parents of minor children eligible for services provided under the AFLA. United Families of America was defendant-intervenor in the proceeding below, where it defended the constitutionality of the AFLA. On September 11, 1987, United Families of America filed a notice of appeal from the final judgment of August 13, 1987, and will file a jurisdictional statement, in accord with Sup. Ct. Rules 12 and 15, within the time limits set by 28 U.S.C. 2101(a).

The Solicitor General's jurisdictional statement raises substantially the same issues that United Families of America will raise in its appeal. United Families of America's reasons for noting probable jurisdiction will be set forth in full in its jurisdictional statement. Judicial economy suggests that the several jurisdictional statements in this case be considered together. We therefore urge this Court to postpone consideration of this jurisdictional statement until all related appeals have been docketed, at which time we would urge the Court to note probable jurisdiction and consolidate the appeals.

---

* United Families of America will respond to the cross-appeal in a separate submission.

Respectfully submitted,

MICHAEL W. MCCONNELL
1111 E. 60th St.
Chicago, IL 60637
(312) 702-3306
Counsel of Record

EDWARD R. GRANT
CLARKE D. FORSYTHE
AMERICANS UNITED FOR LIFE
LEGAL DEFENSE FUND
343 S. Dearborn St., Rm. 1804
Chicago, IL 60604
(312) 786-9494

PAUL ARNESON
1701 Pennsylvania Ave., Suite 940
Washington, D.C. 20006
(202) 785-0530

MICHAEL J. WOODRUFF
MICHAEL A. PAULSEN
c/o CENTER FOR LAW &
RELIGIOUS FREEDOM
P.O. Box 1492
Merrifield, VA 22116
(703) 560-7314

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Nos. 87-253, 87-431, and 87-462

In the Supreme Court of the United States

OCTOBER TERM, 1987

Supreme Court, U.S.
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v.

CHAN KENDRICK, ET AL.

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, APPELLANT

v.

CHAN KENDRICK, ET AL.

CHAN KENDRICK, ET AL., CROSS-APPELLANTS

v.

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE APPELLANT

CHARLES FRIED
Solicitor General

RICHARD K. WILLARD
Assistant Attorney General

DONALD B. AYER
Deputy Solicitor General

ROBERT J. CYNKAR
Deputy Assistant Attorney General

LAWRENCE S. ROBBINS
Assistant to the Solicitor General

MICHAEL JAY SINGER
JAY S. BYBEE
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

The Adolescent Family Life Act, 42 U.S.C. (& Supp. III) 300z *et seq.*, authorizes federal funds to support demonstration projects designed to discourage adolescent pregnancy and to provide care for pregnant adolescents. The question presented is whether the Act violates the Establishment Clause, either on its face or as applied, insofar as it requires applicants for funds to describe how they will, "as appropriate in the provision of services, * * * involve religious and charitable organizations, voluntary associations, and other groups in the private sector as well as services provided by publicly sponsored initiatives" (42 U.S.C. 300z-5(a)(21)(B)).

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, Reverend Robert E. Vaughn, Reverend Lawrence W. Buxton, Dr. Emmett W. Cocke, Jr., Shirley Pedler, Reverend Homer A. Goddard, Joyce Armstrong, John Roberts, and The American Jewish Congress were plaintiffs in the district court; and Sammie J. Bradley, Katherine K. Warner, and the United Families of America were defendants-intervenors in the district court.

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In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-253

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, APPELLANT

v.

CHAN KENDRICK, ET AL.

No. 87-431

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, APPELLANT

v.

CHAN KENDRICK, ET AL.

No. 87-462

CHAN KENDRICK, ET AL., CROSS-APPELLANTS

v.

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE APPELLANT

OPINION BELOW

The opinion of the district court (J.S. App. 1a-46a) is reported at 657 F. Supp. 1547.[1] A subsequent order of the district court (J.S. App. 52a-55a) is unreported.

---

[1] Unless otherwise indicated, citations to "J.S. App." refer to the Appendix to the Jurisdictional Statement in No. 87-431.

JURISDICTION

The interlocutory order of the district court declaring the statute unconstitutional and enjoining the Secretary from enforcing it "as it pertains to 'religious organizations' " (J.S. App. 47a-49a) was entered on April 15, 1987. A notice of appeal to this Court from that order (J.S. App. 56a) was filed on May 15, 1987. On July 7, 1987, the Chief Justice extended the time within which to docket that appeal to and including August 13, 1987, and the appeal was docketed on that date as No. 87-253. The order of the district court declaring the statute's references to "religious organizations" to be severable from the balance of the statute, denying appellant's motion to alter or amend the judgment under Fed. R. Civ. P. 59(e), and dismissing the case from the district court's docket, was entered on August 13, 1987 (J.S. App. 52a-55a). A notice of appeal to this Court from that order (J.S. App. 57a) was filed on August 20, 1987, and the appeal was docketed on September 14, 1987, as No. 87-431. A notice of cross-appeal to this Court from the August 13, 1987 order (87-462 J.S. App. 8a-9a) was filed on August 25, 1987, and the cross-appeal was docketed on October 19, 1987, as No. 87-462. On November 9, 1987, the Court noted probable jurisdiction in Nos. 87-253, 87-431, and 87-462, and consolidated the cases for argument. The jurisdiction of this Court is invoked under 28 U.S.C. 1252.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides in pertinent part:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof * * *.

42 U.S.C. 300z(a)(8)(B) provides in part:

> The Congress finds that [the problems of adolescent premarital sexual relations, pregnancy, and parenthood] * * * are best approached through a variety of integrated and essential services provided to adolescents and their families by other family members, religious and charitable organizations, voluntary associations, and other groups in the private sector as well as services provided by publicly sponsored initiatives.

42 U.S.C. 300z(a)(10)(C) provides in part:

> The Congress finds that services encouraged by the Federal Government should promote the involvement of parents with their adolescent children, and should emphasize the provision of support by other family members, religious and charitable organizations, voluntary associations, and other groups in the private sector in order to help adolescents and their families deal with complex issues of adolescent premarital sexual relations and the consequences of such relations.

42 U.S.C. 300z-2(a) provides in part:

> Demonstration projects shall use such methods as will strengthen the capacity of families to deal with the sexual behavior, pregnancy, or parenthood of adolescents and to make use of support systems such as other family members, friends, religious and charitable organizations, and voluntary associations.

42 U.S.C. 300z-5(a) provides in pertinent part:

> An application for a grant for a demonstration project for services under this subchapter shall be in such form and contain such information as the Secretary may require, and shall include—
>
> * * * * *

(21) a description of how the applicant will, as appropriate in the provision of services—

* * * * *

(B) involve religious and charitable organizations, voluntary associations, and other groups in the private sector as well as services provided by publicly sponsored initiatives * * *.

STATEMENT

A. The Adolescent Family Life Act

1. The Adolecent Family Life Act (AFLA), 42 U.S.C. (& Supp. III) 300z *et seq.*, authorizes appropriations for demonstration grants to public and nonprofit entities for services and research in the area of premarital adolescent sexual relations and pregnancy (S. Rep. 97-161, 97th Cong., 1st Sess. 1 (1981)). When it enacted the AFLA in 1981, Congress found that pregnancy and childbirth, particularly among young adolescents, "often result[] in severe adverse health, social, and economic consequences" (42 U.S.C. 300z(a)(5)).[2] While prior legislation had made a "promising start" in addressing the social costs of adolescent pregnancy, Congress found that there "remain[ed] a substantial need for coordinated, comprehensive services" (S. Rep. 97-161, *supra,* at 6). It therefore sought to "[i]ncrease the flexibility of the program to provide services that address the twin problems of adolescent sexual

[2] In particular, Congress identified such risks as "a higher percentage of pregnancy and childbirth complications; a higher incidence of low birth weight; a higher frequency of developmental disabiiities; higher infant mortality and morbidity; a decreased likelihood of completing schooling; a greater likelihood that an adolescent marriage will end in divorce; and higher risks of unemployment and welfare dependency" (42 U.S.C. 300z(a)(5)).

relations and pregnancy"—problems that Congress believed to be "multidisciplinary in nature" (*id.* at 8-9).

Among the objectives of the AFLA are "to promote self discipline and other prudent approaches to the problem of adolescent premarital sexual relations, including adolescent pregnancy"; "to promote adoption as an alternative for adolescent parents"; and "to establish innovative, comprehensive, and integrated approaches to the delivery of care services for pregnant adolescents" (42 U.S.C. (& Supp. III) 300z(b)(1), (2) and (3)).[3] To achieve these ends, AFLA funds are appropriated for projects that offer either "prevention services," which seek to discourage adolescent premarital sexual relations (see 42 U.S.C. 300z-1(a)(8)), or "care services," which provide care for pregnant adolescents and adolescent parents (see 42 U.S.C. 300z-1(a)(7)).[4] The statute also delineates certain "necessary services" that may be offered as part of prevention or care programs, including, among other things, pregnancy testing and maternity counseling (42 U.S.C. 300z-1(a)(4)(A)); adoption counseling and referral services (42 U.S.C. 300z-1(a)(4)(B)); primary and preventive health services including prenatal and postnatal care (42 U.S.C. 300z-1(a)(4)(C)); nutrition information and counseling (42

[3] In addition, the Secretary is required to give priority to applicants who "serve an area where there is a high incidence of adolescent pregnancy[,]" and who "serve an area with a high proportion of low-income families and where the availability of programs of care for pregnant adolescents and adolescent parents is low" (42 U.S.C. 300z-4(a)(1) and (2)).

[4] The AFLA also authorizes funds to support research projects concerning the societal causes and consequences of adolescent premarital sexual relations and pregnancy (see 42 U.S.C. 300z-7, 300z(b)(4), (5) and (6)). The present lawsuit does not challenge that portion of the statute (see J.S. App. 5a).

U.S.C. 300z-1(a)(4)(D)); educational services relating to family life (42 U.S.C. 300z-1(a)(4)(G)); consumer education and homemaking (42 U.S.C. 300z-1(a)(4)(L)); family planning services (42 U.S.C. 300z-1(a)(4)(P)); and referrals for screening and treatment of venereal disease (42 U.S.C. 300z-1(a)(4)(E)), pediatric care (42 U.S.C. 300z-1(a)(4)(F)), licensed residential care or maternity home services (42 U.S.C. 300z-1(a)(4)(I)), or mental or physical health services (42 U.S.C. 300z-1(a)(4)(J)).

The AFLA contains two principal restrictions on the use of appropriated funds. First, pursuant to Section 300z-3(b)(1), funds may not be used to provide family planning services, unless such services are not otherwise available in the community. This reflects Congress's determination that "money spent on birth control services under this program would divert resources from the purposes of the act" (S. Rep. 97-161, *supra,* at 13). Second, AFLA grants are limited "to programs or projects which do not provide abortions or abortion counseling or referral, or which do not subcontract with or make any payment to any person who provides abortions or abortion counseling or referral, except that any such program or project may provide referral for abortion counseling to a pregnant adolescent if such adolescent and the parents or guardians of such adolescent request such referral" (42 U.S.C. 300z-10(a)). Congress concluded that "legislation, to foster alternatives to abortion, and to encourage adolescents to bring their babies to term, serves a critical national interest" (S. Rep. 97-161, *supra,* at 20).

2. In enacting the AFLA, Congress found that the complex problems of adolescent premarital sexual relations, pregnancy, and parenthood are best approached on several fronts. "Recognizing the limitations of Government in dealing with a problem that has complex moral and social dimensions" (S. Rep. 97-161, *supra,* at 15), Congress accordingly sought to draw, wherever possible,

on the accumulated resources and experience of existing institutions.

For example, in approving applications for grants, the Secretary is to give priority to applicants who "will utilize to the maximum extent feasible existing available programs and facilities such as neighborhood and primary health care centers" (42 U.S.C. 300z-4(a)(4)), and who "have involved the community to be served, including public and private agencies, adolescents, and families, in the planning and implementation of the demonstration project" (42 U.S.C. 300z-4(a)(7)). In applying for funds, prospective grantees must describe "existing pregnancy prevention services and programs of care" and state how the services they intend to furnish will be coordinated and integrated with other related programs and services (42 U.S.C 300z-5(a)(3) and (5)(A)). And applicants must also describe how they will identify and refer adolescents needing services other than those provided directly by the applicant (42 U.S.C. 300z-5(a)(6)).[5]

Consistent with this objective of establishing "better coordination, integration, and linkages" among existing community programs (42 U.S.C. 300z(b)(3)), the AFLA requires project applicants to describe how they will, "as appropriate in the provision of services[,] * * * involve religious and charitable organizations, voluntary associations, and other groups in the private sector as well as services provided by publicly sponsored initiatives" (42 U.S.C 300z-5(a)(21)). Congress determined that such broad-based community involvement would "help guarantee" the program's ultimate success (S. Rep. 97-161, *supra,* at 15), and it believed that "nonprofit religious organizations

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[5] The Secretary is also to give priority to applicants who "can demonstrate a community commitment to the program by making available to the demonstration project non-Federal funds, personnel, and facilities" (42 U.S.C. 300z-4(a)(6)).

have a role to play in the provision of services to adolescents" (*id.* at 16). Congress also emphasized that "[r]eligious affiliation is not a criterion for selection as a grantee" (*ibid.*), but concluded that "promoting the involvement of religious organizations in the solution to these problems is neither inappropriate or illegal" (*ibid.*).[6]

3. Since passage of the AFLA in 1981, the Secretary has received 1,088 applications for grants and has awarded 141 grants. In the current grant cycle alone, the Secretary has received more than 400 applications and has made 37 new federal grant awards. The government presently funds 82 projects at an overall cost of approximately $10 million, and in issuing its grants it routinely informs funded projects that they may not use the funds to inculcate religion (see, *e.g.*, J.A. 757, 759, 761).

AFLA grantees cover a broad spectrum. There have been grants, for example, to state and county health departments, such as the Hawaii Department of Health, the Guam Department of Public Health and Social Services, and the Lyon County Health Department in Emporia, Kansas; colleges and universities, such as the School of Public Health at the University of South Carolina, the University of Utah, Emory University, and Gallaudet College; school districts, such as Tucson United School District No. 1 in Tucson, Arizona, and Mt. Vernon Public Schools in Mt. Vernon, New York; hospitals, such as Family Hospital in Milwaukee, Memorial General Hospital Association of Elkins, West Virginia, and St. Mary's Hospital in Kansas City; community health associations, such as the SeMo Association of Public Health Administrators in Missouri; privately-operated

[6] Congress noted that under Title VI of the Health Services and Centers Amendments of 1978, Pub. L. No. 95-626, 92 Stat. 3595, the predecessor to AFLA, the Secretary had awarded grants to several religiously-affiliated organizations. S. Rep. 97-161, *supra*, at 16.

health care centers, such as the Charles Henderson Center in Troy, Alabama; and community and charitable organizations, such as Father Flanagan's Boys Home in Omaha, Hull House of Chicago, Covenant House of New York City, Catholic Family Services of Amarillo and YWCA's in Salem, Oregon and St. Petersburg, Florida.

The programs funded by the AFLA over its history reflect the integration of community services that Congress sought to achieve.[7] Tucson Unified School District No. 1, for example, served as the anchor agency for the Pima Associated Services for Adolescent Family Education project (PASAFE). The agencies involved in the PASAFE program made available hundreds of filmstrips, books, pamphlets, booklets and other materials for teens, parents, and others on topics such as self-respect, stress, alcohol and teenagers, parents as sex educators, marriage, decisionmaking, biology, menstruation, human reproduction, family violence, prenatal care, child care, single-parent families, parenting, childbirth, choosing doctors, child development, nutrition, and baby foods. J.A. 487, 714-717. The School District also operated the Teenage Parent Program, an alternative school for pregnant and parenting youth (J.A. 486, 714-716). In addition, it contracted with a number of metropolitan based organizations, several of which are religiously affiliated, to provide a comprehensive program of health, social, and educational services to teens. Among the organizations were three health agencies: Pascua Yaqui Tribe Health Department, St. Elizabeth of Hungary Clinic, and El Rio Santa

[7] Because AFLA projects may be funded for no more than a five-year period (42 U.S.C 300z-4(c)(1)), all but one of the projects as to which evidence was submitted (including the projects listed here and those cited by the district court) are no longer funded. We mention these projects as typical of those that have been or are currently being funded under the Act.

Cruz Health Center; and three family social service agencies: Catholic Social Service, Jewish Family Service and Arizona Children's Home. *Ibid.*

The Camden County Adolescent Family Life Program of Camden County, New Jersey, served a wide range of different communities, ranging from the city of Camden—which has been rated by the Brookings Institute as the ninth most distressed city in the nation—to very affluent communities. See *Pregnancy-Related Health Services: Hearings Before the Subcomm. on Health and the Environment of the Comm. on Energy and Commerce,* 99th Cong., 1st Sess. 126 (1985) (statement of Ruth W. Salmon). Camden County provided both prevention and care services. It furnished information directly to adolescents through a variety of approaches, including workshops; it provided consultation to schools in the development of their curricula relating to family life; it trained school teachers on family life education; and it conducted a workshop for parents entitled "Communicating With Your Child About Sexuality." *Id.* at 127, 133-134. During fiscal year 1984, these prevention programs served 2790 youths, 409 parents, and 688 educators (*id.* at 134). Camden County's clinical programs attempted to prevent repeat pregnancies among already pregnant teenagers and to provide prenatal services that ensure the health of both mother and child (*id.* at 127). There was special focus on youth who bear a higher risk of adolescent pregnancy, such as youth who have been incarcerated and the siblings of already pregnant teens (*ibid.*). During fiscal year 1984, Camden County served 812 pregnant teens, 44 nonpregnant teens, 623 teen mothers, 290 infants of teen mothers, 425 male partners, and 909 extended family members in its care services program (*id.* at 136).

Catholic Family Services of Amarillo, Texas (CFS), operated a combined care and prevention program under AFLA. Care services provided by CFS included pregnancy counseling and testing, adoption services, pre- and post-

natal medical care, child care, family planning information and referral services, consumer education, and educational and vocational counseling. Prevention services included presentations on teen sexuality and decision-making for adolescents and their families, courses for parents on educating their children about sex, and counseling for sexually active adolescents and their families. J.A. 446, 447, 710-712. CFS had service agreements with state, county and municipal health agencies; county probation departments; Texas Tech University; Amarillo Public System; and Planned Parenthood (J.A. 447-448, 694-695). As part of its community outreach program, CFS made presentations on teenage sexuality and services available under the AFLA program at public and parochial schools, hospitals, churches, civic groups, colleges, public libraries, county courthouses and television and radio stations (J.A. 448-449, 694).

B. The Present Controversy

1. Appellees, a group of taxpayers, clergymen, and the American Jewish Congress, brought this action to enjoin the enforcement of the care and prevention services provisions of the AFLA, claiming that the Act violates the Religion Clauses of the First Amendment. On April 15, 1987, the district court granted summary judgment in appellees' favor (J.S. App. 1a-49a), declaring the Act unconstitutional, on its face and as applied, "insofar as religious organizations are involved in carrying out the programs and purposes of the Act" (*id.* at 48a).

The court first considered the nature of facial and as-applied challenges under the Establishment Clause and observed that the distinction between them "has not been clearly delineated" in this Court's decisions (J.S. App. 4a). It concluded that a statute must be struck down on its face even if a particular application of the statute "is the only constitutionally offensive element to which the court has

pointed" (*ibid.*). Proceeding to apply the three-part test of *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971), the court found that the AFLA has a valid secular purpose (J.S. App. 17a-22a), but that it has the primary effect of advancing religion, and that it promotes excessive entanglement.[8]

With regard to the primary effect test, the court stated that "[w]here the connection between a statute and religion is apparent from the face of the statute," one need only inquire whether the effect of the statute in advancing religion is "direct and immediate" rather than "remote or incidental" (J.S. App. 23a-24a). Only "where the connection to religion is not apparent on the face of the statute or from the nature of the government act itself," must a court consider whether the beneficiary of that action is pervasively sectarian (*id.* at 24a). The court stated that where the effect on religion is not direct and immediate, and the affected entity is not pervasively sectarian, a court must further inquire whether the statute nonetheless funds a specific religious activity (*ibid.*).

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[8] As a preliminary matter, the court rejected appellant's argument that appellees lack standing to challenge the constitutionality of the statute as applied (J.S. App. 8a-12a). See n. 24, *infra*. The court also rejected appellees' argument that the statute should be reviewed under the strict scrutiny standard set forth in *Larson* v. *Valente*, 456 U.S. 228 (1982) (J.S. App. 13a-15a), rather than under the three-part test of *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971).

Thereafter, in finding a valid secular purpose, the court found that "the AFLA was motivated by Congress' concern that teenage pregnancy and premarital sexual relations are very damaging to society and, particularly, to adolescents" (J.S. App. 17a-18a (footnote omitted)). Moreover, the court observed (*id.* at 20a (emphasis in original)) that the mere fact that this secular purpose "coincide[s] or conflict[s] with religious tenets does not transform [it] into [a] sectarian purpose[] motivated *wholly* by religious considerations." "Religious organizations," the court concluded (*id.* at 21a-22a), "can play a vital role in furthering secular values."

Applying this test—which the court acknowleged was "put more neatly than the many decisions which form its base" (J.S. App. 25a)—the court first held that the statute, on its face, has a primary effect of advancing religion (*id.* at 27a-32a). It examined the text and legislative history of the AFLA (*id.* at 27a-28a) and found that the statute "explicitly permits religious organizations to be grantees and envisions a direct role for those organizations in the education and counseling components of AFLA grants" (*id.* at 28a). Applying the analysis it had devised, the court therefore inquired whether the statute "directly and immediately" advances religion, and it concluded that it does. The court reasoned that AFLA programs involve "*teaching* by grant recipients and subcontractors * * * about the harm of premarital sexual relations and the factors supporting a choice of adoption rather than abortion, and these matters are fundamental elements of religious doctrine" (*ibid.* (emphasis in original)). Moreover, the court observed, "the AFLA contains no restriction whatsoever against the teaching of religion *qua* religion" (*id.* at 29a).[9] The court concluded that by subsidizing a fundamentally religious mission and thereby creating a "crucial symbolic link" between government and religion, the AFLA on its face has a primary effect of advancing religion (*id.* at 30a-32a).

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[9] The court acknowledged that the Secretary's " 'Notice of Grant Award' specifies that grants may not be used to 'teach or promote religion,' " but it held that this was "merely an unpublished administrative warning that was written at agency discretion and can be revoked by agency fiat." The court stated that it was "also aware that defendant claims that HHS officials verbally advised grantees that they may not use AFLA funds to teach religion." It concluded, however, that "[e]ven if true, the fact that HHS warnings may undo some of the statute's damage does not solve the problem with the statute itself, and it is with the statute alone that a facial inquiry is concerned." J.S. App. 29a n.13.

The district court next held (J.S. App. 32a-38a) that the statute, as applied, has a primary effect of advancing religion because grants in practice have been made to "religious organizations." Declining to "engage in an exhaustive recitation of the record" (J.S. App. 33a), the court discussed several instances of what it found to be objectionable use of grant funds (*id.* at 33a-38a).[10] The court found (*id.* at 34a-35a) that ten grantees or subgrantees "were themselves 'religious organizations' in the sense that they have explicit corporate ties to a particular religious faith and by-laws or policies that prohibit any deviation from religious doctrine." The court also noted (*id.* at 33a) that other grantees, "while not explicitly affiliated with a religious denomination, are religiously inspired and dedicated to teaching the dogma that inspired them." And the court found that several AFLA programs took place at sites adorned with religious symbols and were administered by members of religious orders, thereby causing participants in the programs to "believe[] that these federally funded programs were also sponsored by the religious denomination" (*id.* at 37a). The court did not find that any of the participating organizations were "pervasively sectarian."

Finally, the district court held (J.S. App. 39a-43a) that the statute engenders excessive government entanglement with religion. Without distinguishing among the various types of "religious organizations" involved here, including universities, hospitals, maternity homes, and YWCAs, the court surmised that "the risk that AFLA funds will be used

[10] For example, the district court identified (J.S. App. 37a) one grantee that had "attempted to evade restrictions [on] * * * religious teaching, by establishing programs in which an AFLA-funded staffer's presentations would be immediately followed, in the same room and in the staffer's presence, by a program presented by a member of a religious order and dedicated to presentation of religious views on the subject covered by the AFLA staffer."

to transmit religious doctrine can be overcome only by government monitoring so continuous that it rises to the level of excessive entanglement" (*id.* at 40a). And it found that the AFLA's funding of one-on-one counseling of impressionable adolescents substantially aggravates this problem (*id.* at 42a-43a).[11]

The district court therefore declared the AFLA unconstitutional and enjoined its enforcement insofar "as it pertains to 'religious organizations' " (J.S. App. 48a). On May 22, 1987, the district court issued an order staying the effect of its judgment until September 30, 1987, insofar as it pertains to current grantees (*id.* at 50a-51a). On August 10, 1987, the Chief Justice issued an order (No. A-99) granting a stay pending appeal.

2. On August 13, 1987, the date on which the Secretary docketed his appeal (No. 87-253) from the district court's interlocutory order, the district court entered a final judgment in the case (J.S. App. 52a-55a).[12] In that judgment, the district court held that the AFLA's references to "religious organizations" are severable from the balance of the statute. Examining the language and legislative history of the statute, the district court con-

[11] The district court also found (J.S. App. 44a) that the statute would "tend to incite political division along religious lines" because AFLA programs involve "sensitive issues upon which religions' fundamental beliefs differ." Moreover, the court believed that such division would be "recurring and intensified" (*ibid.*) because appropriations under the Act are made annually. The court acknowledged, however, that political divisiveness has never been the only ground for holding a statute unconstitutional (*id.* at 43a), and stated that "the political division caused by the AFLA may not be sufficient to invalidate it" (*id.* at 44a).

[12] Although the district court did not enter its final judgment "on a separate document" (Fed. R. Civ. P. 58), the August 13, 1987, order was evidently intended as the district court's final judgment since it "ordered that this case is dismissed from the docket of this Court" (J.S. App. 55a).

cluded (*id.* at 54a) that "Congress would have enacted the AFLA without its reference to 'religious organizations,' " and that "the AFLA is fully and constitutionally operative as law in a manner consistent with the intent of Congress absent its references to 'religious organizations.' "

In the August 13, 1987 judgment, the court also denied the Secretary's Rule 59(e) motion to clarify which grantees were "religious organizations" within the meaning of the court's injunction (J.S. App. 54a-55a). It stated (*id.* at 54a) that it was "puzzled" by the Secretary's request that it "define the term 'religious organization,' " and it found (*id.* at 55a) that "the language of the [April 15, 1987] Order is clear" on that point. The court also stated (*ibid.*) that "[t]here is * * * ample precedent in numerous statutes and federal regulations defining the term 'religious organizations.' "

ated in providing social services to the community.[13] "[R]eligion has been closely identified with our history and government," this Court observed in *Abington School Dist.* v. *Schempp,* 374 U.S. 203, 212 (1963), and it is therefore "inevitable that the secular interests of Government and the religious interests of various sects and their adherents will frequently intersect * * * and combine." *Wallace* v. *Jaffree,* 472 U.S. 38, 69-70 (1985) (O'Connor, J., concurring). And because religion shares with government a common concern with social welfare, the government has never been barred from "acknowledging religion or from taking religion into account in making law and policy;" (*ibid* Together, governments and religiously affiliated gro have tended to the needs of the sick,[14] the orphaned,[1 delinquent adolescents,[16] and the poor.[17] And in re ent years, religious organizations have par-

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[13] See Pic ell & Horwich, *"Religion as an Engine of Civil Policy": A Commen the First Amendment Limitations on the Church-State Partnership the Social Welfare Field,* 44 Law & Contemp. Probs. 111, 112-114 (981); B. Coughlin, *Church and State in Social Welfare* 15-43 (1965); A. Reichley, *Religion in American Public Life* 168-339 (1985).

[14] *Bradfield* v. *Roberts,* 175 U.S. 291 (1899); *Washington Health Care Facilities Auth.* v. *Spellman,* 96 Wash. 2d 68, 633 P.2d 866 (1981); *Abernathy* v. *City of Irvine,* 355 S.W. 2d 159 (Ky. 1961, cert. denied, 371 U.S. 831 (1962); *Craig* v. *Mercy Hosp. – Street Memorial,* 209 Miss. 427, 45 So.2d 809 (1950); *Kentucky Bldg. Comm'n* v. *Effron,* 310 Ky. 355, 220 S.W.2d 836 (1949).

[15] *Sargent* v. *Board of Educ. of Rochester,* 177 N.Y. 317, 69 N.E. 722 (1904); *Murrow Indian Orphans Home* v. *Childers,* 197 Okla. 249, 171 P.2d 600 (1946).

[16] *Schade* v. *Allegheny County Inst. Dist.,* 386 Pa. 507, 126 A.2d 911 (1956); *Dunn* v. *Chicago Indus. School for Girls,* 280 Ill. 613, 117 N.E. 735 (1917).

[17] *Community Council* v. *Jordan,* 102 Ariz. 448, 432 P.2d 460 (1967).

INTRODUCTION AND SUMMARY OF ARGUMENT

Congress enacted the AFLA to address the "severe adverse health, social, and economic consequences" associated with adolescent pregnancy (42 U.S.C. 300z(a)(5)). It recognized, however, that the problem was "multidisciplinary in nature" (S. Rep. 97-161, *supra,* at 9), with "complex moral and social dimensions" (*id.* at 15), and it therefore sought to draw support from a wide array of community groups, including "religious and charitable organizations, voluntary associations, and other groups in the private sector as well as services provided by publicly sponsored initiatives" (42 U.S.C. 300z-5(a)(21)). By explicitly permitting religious groups, among others, to assist in providing AFLA services, Congress recognized that nonprofit religious organizations can play an important role in delivering care and prevention services to adolescents (see S. Rep. 97-161, *supra,* at 16).

In so doing, Congress broke no new ground. For nearly a century, governments and religious groups have cooper-

ticipated in a variety of programs funded by state and federal governments—programs that, according to one commentator, have included such varied (and secular) enterprises as "hospitals, soup kitchens, drug abuse programs, orphanages, emergency shelters, nursing homes, family planning services, higher education, housing, job training, economic development, refugee resettlement, Head Start, tutoring, mental health programs, arts and humanities projects, school lunches, and foreign disaster relief." McConnell, *Political and Religious Disestablishment,* 1986 B.Y.U. L. Rev. 405, 421.[18]

Two factors, among others, may account for this historical partnership. The first is the intrinsic connection between religious doctrine and social service. For many religious persons, the call of faith is also a call to service. Religious persons have for that reason traditionally been drawn to social action on behalf of the needy. B. Coughlin, *Church and State in Social Welfare* 21, 28-35,

[18] See, *e.g.*, 42 U.S.C. (Supp. IV) 622, as amended by Pub. L. No. 96-272, § 103(a), 94 Stat. 516 (Title IV-B of Child Welfare Services); 42 U.S.C. (1976 ed.) 630-644 (Work Incentive Program), (as implemented according to 45 C.F.R. 224.30(c)(1) (1980)); 42 U.S.C. (1976 ed.) 1397a (Title XX Day Care Services under Social Security Act); 42 U.S.C. (1976 ed.) 2931-2932 (Head Start); Disaster Relief Act of 1974, Pub. L. No. 93-288, § 312, 88 Stat. 150; Juvenile Delinquency Prevention and Control Act of 1968, Pub. L. No 90-445, § 102, 82 Stat. 463; Social Security Amendments of 1967, Pub. L. No. 90-248, § 301, 81 Stat. 821 (amending Title V of the Social Security Act, Maternal and Child Health and Crippled Children's Services); Housing Act of 1961, Pub. L. No. 87-70, § 101, 75 Stat. 149 (amending National Housing Act § 221(d)(3), 12 U.S.C. 1715*l*(d)(3)); Housing Act of 1959, Pub. L. No. 86-372, § 202, 73 Stat. 667; See also *Bill to Provide for Judicial Review of the Constitutionality of Grants or Loans Under Certain Acts: Hearings on S.2097 Before the Subcomm. on Constitutional Rights of the Senate Judiciary Comm.*, 89th Cong., 2d Sess. 699-716 (1968) (summary of federal programs under which religious organizations may receive assistance).

38-43 (1965); Pickrell & Horwich, *"Religion as an Engine of Civil Policy": A Comment on the First Amendment Limitations on the Church-State Partnership in the Social Welfare Field,* 44 Law & Contemp. Probs. 111, 112 (1981). Second, and as a result, religious organizations have over time developed an extensive infrastructure for delivering social services to the community. See *Pickrell & Horwich, supra,* 44 Law & Contemp. Probs. at 112; A. Reichley, *Religion in American Public Life* 219-220 (1985). Well-established charitable arms of religious groups provide food, clothing and shelter to the needy, and like other charitable organizations have done so in partnership with government for many years.

The district court, however, found that partnership to be unconstitutional in the context of the AFLA care and prevention programs. Without stopping to inquire whether particular religiously affiliated organizations were "pervasively sectarian"—so that "a substantial portion of their functions are subsumed in the religious mission," *Hunt* v. *McNair,* 413 U.S. 734, 743 (1973)—the court found the AFLA objectionable because it had a "direct and immediate" effect of advancing religion. Among its other objectives, the statute funds teaching and counseling on issues that, for some, are matters of religious faith, and the court found it "simply unrealistic" "[t]o presume that AFLA counselors from religious organizations can put their beliefs aside when counseling an adolescent on matters that are part of religious doctrine" (J.S. App. 30a).

But it is the district court, and not Congress, that has applied an unwarranted "presumption." The court presumed, at bottom, that no religious person can deliver the AFLA care and prevention services without inculcating religious doctrine. The court thereby applied to all "religious organizations" principles that have been developed uniquely for "pervasively sectarian" institutions

such as parochial schools. The district court thereby misapplied the three-part test articulated in *Lemon* v. *Kurtzman*, 403 U.S. 602 612-613 (1971), and reached a result inconsistent with the Court's Establishment Clause jurisprudence and two centuries of history.

A. The AFLA has a clearly secular purpose, as the district court correctly found (J.S. App. 19a). The text and legislative history confirm that Congress sought to address "the problems caused by teenage pregnancy and premarital sexual relations" (*ibid.*). That plainly secular purpose, moreover, is not pretextual simply because a prior statute, supplanted by the AFLA, did not explicitly advert to the role of religious organizations in the delivery of services.

B. The primary effect of the statute, on its face and as applied, neither advances nor inhibits religion. This Court has explained that such an impermissible effect may be found either where government aid flows to a "pervasively sectarian" institution, or where it assists a "specifically religious activity in an otherwise substantially secular setting" (*Hunt* v. *McNair*, 413 U.S. 724, 743 (1973)). Because it applied a quite different "direct and immediate" test, the district court made no such findings in this case.

The court's failure to consider the central distinction in this Court's cases between "pervasively sectarian" institutions (which often are disabled from participating in government programs) and other religiously affiliated institutions (which ordinarily may participate on an equal footing) impairs both the facial and as-applied analysis of the statute. The court's facial analysis of the statute fails because it effectively presumes that all "religious organizations" are alike and that none can be expected to deliver the AFLA services in a lawful, secular manner. The court's as-applied analysis is similarly flawed, since it never comes to grips with the significant variations in nature and purpose among the individual AFLA grantees. Finally, the

court also made no inquiry as to whether the AFLA provides funds to specifically religious activity within an otherwise secular setting. On this record, however, no such findings could have been made.

C. The AFLA does not require excessive entanglement with religion. This Court has never applied the entanglement doctrine outside the special setting of pervasively sectarian institutions. Two reasons account for that result: first, outside the context of a pervasively sectarian grantee, monitoring by the government to ensure compliance with the terms of a grant is simple monitoring, the kind of oversight that occurs every day in the context of a great many government grant programs; and second, there is little or no basis for presuming that religiously affiliated organizations that are not pervasively sectarian will provide otherwise secular services in a forbidden, non-secular manner. In once more failing to distinguish between "pervasively sectarian" and other "religious organizations," the district court misapplied the entanglement doctrine.

ARGUMENT

THE ADOLESCENT FAMILY LIFE ACT DOES NOT, EITHER ON ITS FACE OR AS APPLIED, VIOLATE THE ESTABLISHMENT CLAUSE

The Court has generally applied the three-part test set forth in *Lemon* v. *Kurtzman*, 403 U.S. 602, 612-613 (1971) (citations omitted), in evaluating Establishment Clause challenges to governmental action: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive government entanglement with religion.' " Accord *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints* v. *Amos*, No. 86-179

(June 24, 1987), slip op. 7-11; *Grand Rapids Sch. Dist.* v. *Ball*, 473 U.S. 373, 382-383 (1985).[19] The AFLA satisfies each of these requirements.

A. *The AFLA Has a Secular Legislative Purpose*

"The Court has invalidated legislation or governmental action on the ground that a secular purpose was lacking, but only when it has concluded there was no question that the statute or activity was motivated *wholly* by religious considerations." *Lynch* v. *Donnelly*, 465 U.S. 668, 680 (1984) (emphasis added). Indeed, "[e]ven where the benefits to religion were substantial," the Court has found "a secular purpose and no conflict with the Establishment Clause" (*ibid.*). Accord *Wallace* v. *Jaffree*, 472 U.S. 38, 56 (1985). Moreover, in discerning the purpose for governmental action, the Court "is normally deferential to a [legislature's] articulation of a secular purpose" (*Edwards* v. *Aguillard*, No. 85-1513 (June 19, 1987), slip op. 7), and is "reluctan[t] to attribute unconstitutional motives to [Congress], particularly when a plausible secular purpose for the * * * program may be discerned from the face of the statute." *Mueller* v. *Allen*, 463 U.S. 388, 394-395 (1983).[20] The district court applied those principles and correctly concluded (J.S. App. 19a) that AFLA has the clearly secular purpose of addressing "the problems caused by teenage pregnancy and premarital sexual relations."

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[19] At the same time, the Court has stated that these criteria "must not be viewed as setting the precise limits to the necessary constitutional inquiry, but serve only as guidelines with which to identify instances in which the objectives of the Establishment Clause have been impaired." *Meek* v. *Pittenger*, 421 U.S. 349, 359 (1975). Accord *Lynch* v. *Donnelly*, 465 U.S. 668, 678-679 (1984); *Mueller* v. *Allen*, 463 U.S. 388, 394 (1983).

[20] See, *e.g.*, *Committee for Pub. Educ. and Religious Liberty* v. *Regan*, 444 U.S. 646, 654 (1980); *Meek* v. *Pittenger*, 421 U.S. 349, 363

The stated purposes of the AFLA (42 U.S.C. (& Supp. III) 300z(b)) are "to promote self discipline and other prudent approaches to the problem of adolescent premarital sexual relations, including adolescent pregnancy"; "to promote adoption as an alternative for adolescent parents"; "to establish innovative * * * approaches to the delivery of care services for pregnant adolescents"; to encourage research on "the societal causes and consequence of adolescent premarital sexual relations, contraceptive use, pregnancy, and child rearing"; "to support evaluative research" that may help "alleviate * * * any negative consequences of adolescent premarital sexual relations and adolescent childbearing"; and "to encourage * * * the dissemination of results" from the funded programs.

To be sure, the AFLA permits religious organizations to participate in funded programs, but only among a wide range of community groups whose combined efforts would "help guarantee the ultimate success of the[] program by ensuring the early involvement of State, local and private entities in the funding and support of the[] program" (S. Rep. 97-161, *supra*, at 15). By recognizing that "nonprofit religious organizations have a role to play in the provision of services to adolescents" (*id.* at 16), Congress promoted, rather than undermined, the unquestionably secular purposes of the Act.

Appellees contended below, however, that the stated purposes of the statute are pretextual. In their view, the fact that Congress substituted the AFLA for the Health Services and Centers Amendments of 1978, Pub. L. No. 95-626, Tit. VI, 92 Stat. 3595, and added, inter alia, an ex-

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(1975); *Committee for Pub. Educ.* v. *Nyquist*, 413 U.S. 756, 773 (1973); *Sloan* v. *Lemon*, 413 U.S. 825, 829-830 (1973); *Hunt* v. *McNair*, 413 U.S. 734, 741-742 (1973); *Levitt* v. *Committee for Pub. Educ.*, 413 U.S. 472, 479 n.7 (1973); *Tilton* v. *Richardson*, 403 U.S. 672, 678-679 (1971); *Lemon* v. *Kurtzman*, 403 U.S. at 613; *Board of Educ.* v. *Allen*, 392 U.S. 236, 243 (1968).

plicit reference in the statute to religious organizations, demonstrates that the Act lacks a secular purpose. The district court correctly rejected that claim (J.S. App. 20a-22a).

First, by permitting religious organizations to participate in the delivery of services, Congress did not "abandon[] neutrality and act[] with the intent of promoting a particular point of view in religious matters." *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints* v. *Amos*, No. 86-179 (June 24, 1987), slip op. 7. Quite the contrary, it sought to ensure that funded projects take account of an important social reality: that "religious organizations can play a vital role in furthering secular values" (J.S. App. 21a-22a). Congress included religious organizations simply as one participant among "a wide array of educational, health, and supportive services" (42 U.S.C. 300z(a)(9)) whose combined efforts were required to deliver secular services to adolescents in need.[21]

Furthermore, as the court noted (J.S. App. 21a), "Title VI was amended not only to add religious organizations to the list of entities that may participate in AFLA programs, but also to add families, charitable organizations, voluntary associations and other groups." It was amended in other ways as well, including the addition of a program of research grants. See 42 U.S.C. 300z-7. It cannot be said,

[21] The district court was also correct in rejecting (J.S. App. 19a-20a n.11) the claim that the articulated purposes of the statute are pretextual because Congress could have achieved its ends without including religious organizations. That claim is mistaken in fact, since Congress explicitly determined that religious groups are peculiarly able to play an important role in the delivery of secular services to the community. See S. Rep. 97-161, *supra*, at 16. But the claim is also legally irrelevant. The question is not whether the government's "objectives could have been achieved without including [religious organizations]"; rather, "[t]he question is whether [including them] * * * violates the Establishment Clause" (*Lynch* v. *Donnelly*, 465 U.S. at 681 n.7).

therefore, that the law was changed *solely* to ensure the participation of religious organizations in funded programs.[22]

B. The Primary Effect of The AFLA Neither Advances Nor Inhibits Religion

In *Hunt* v. *McNair*, 413 U.S. 734, 743 (1973), the Court articulated the standard for assessing "primary effect" under the Establishment Clause:

> Aid normally may be thought to have a primary effect of advancing religion when it flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission or when it funds a specifically religious activity in an otherwise substantially secular setting.

Accord, *e.g.*, *Roemer* v. *Maryland Pub. Works Bd.*, 426 U.S. 736, 752, 755 (1976) (plurality opinion). See also *Grand Rapids Sch. Dist.* v. *Ball*, 473 U.S. at 388 (found impermissible effect, citing "pervasively sectarian environment of a religious school"); *Meek* v. *Pittenger*, 421 U.S. at 371 (found impermissible effect where "education is an integral part of the dominant sectarian mission" and "atmosphere dedicated to the advancement of religious belief is constantly maintained"). The district court, however, did not apply that standard and therefore did not inquire either as to the pervasively sectarian nature of the AFLA

[22] The present case is in that sense distinguishable from *Wallace* v. *Jaffree*, 472 U.S. 38 (1985), where a state statute authorizing a period of silence in public schools for "meditation or voluntary prayer" was found to lack a secular purpose, in part because it had replaced an earlier statute that already authorized a period of silence simply for "meditation." The Court noted (*id.* at 59) that in authorizing "voluntary prayer" in addition to "meditation," the later statute could only have been "enacted to convey a message of State endorsement and promotion of prayer," in violation of the Establishment Clause.

grantees or as to the funding of specifically religious activities. Instead, the court proposed a novel standard (J.S. App. 25a): "If the connection between religion and the challenged government statute or practice is clear from the face of the statute, the Court must determine whether that statute has the 'direct and immediate' effect of advancing religion." Examining the text and legislative history of the statute, the court found that there was a "clear connection between religious organizations and the federally funded AFLA programs" and it therefore applied the " 'direct and immediate' effect analysis" (*id.* at 28a). That test was met in this case, the court concluded, because the statute authorizes funding to teach and counsel on matters closely related to religious beliefs, and the court was unwilling to presume that counselors in that situation "can put their beliefs aside" (*id.* at 30a).

It is the district court, however, and not Congress, that has indulged an unwarranted presumption—that any "religious organization," regardless of its nature or purposes, will be driven by religious beliefs to violate the terms of its AFLA grant by inculcating religion. The Court's cases make clear that absent an initial determination that a particular recipient of assistance is "so permeated by religion that the secular side cannot be segregated from the sectarian" (*Roemer*, 426 U.S. at 759) religiously affiliated organizations may participate fully in governmental programs. Only by presuming otherwise could the district court strike down the statute on its face. And that presumption impaired the court's as-applied analysis as well, since it distracted the court from undertaking the intensive examination of the sectarian nature of the individual grantees that is required by this Court's cases. Finally, the effect of the court's approach, as demonstrated by its decision in this case, is to draw a line of separation that excludes from major areas of national life all organizations and undertakings that maintain any religious affiliation or allegiance.

1. a. This Court's cases involving government funding programs make clear that the heart of any Establishment Clause analysis is whether the assisted organizations are pervasively sectarian in nature. The critical importance of that inquiry is best reflected in the crisp distinction drawn by this Court between primary and secondary parochial schools, whose mission often disables them from receiving governmental assistance, and other religiously-affiliated organizations, which are ordinarily free to participate in government programs on an equal footing. The Court has observed that in parochial schools, education and counseling are "integral part[s] of the dominant sectarian mission * * * in which an atmosphere dedicated to the advancement of religious belief is constantly maintained." *Meek* v. *Pittenger,* 421 U.S. 349, 371 (1975). The Court has emphasized that in a parochial school setting "[r]eligious authority necessarily pervades the school system," and that it is the "substantial religious character of * * * church-related schools" (*Lemon* v. *Kurtzman,* 403 U.S. at 616-617), that requires the Court to be "particularly vigilant" (*Edwards* v. *Aguillard,* No. 85-1513 (June 19, 1987), slip op. 4). The "danger that a teacher under religious control and discipline poses to the separation of the religious from the purely secular" is a "conflict of functions [that] inheres in the situation" (*Lemon* v. *Kurtzman,* 403 U.S. at 617). Put another way, "where the teacher works within and for a sectarian institution, an unacceptable risk of fostering of religion is an inevitable byproduct." *Wolman* v. *Walter,* 433 U.S. 229, 254 (1977). See also *Grand Rapids Sch. Dist.* v. *Ball,* 473 U.S. 373, 384-385, 391-392 (1985); *NLRB* v. *Catholic Bishop,* 440 U.S. 490, 501-504 (1979).[23]

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[23] The Court's vigilance in connection with aid to primary and secondary schools is additionally justified by the fact that the government has made primary education compulsory, making children whose parents select religious schools nearly a captive audience for as many hours as they are required to attend.

But there are a great many "religious organizations"—such as the hospitals and maternity homes providing care to pregnant teenagers here—that are fully capable of discharging their services without permitting "ideological content * * * [to] creep in[ ]" (*Grand Rapids Sch. Dist.*, 473 U.S. at 389). "[T]he proposition that the Establishment Clause prohibits any program which in some manner aids an institution with a religious affiliation has consistently been rejected" (*Hunt* v. *McNair*, 413 U.S. at 742). Indeed, the Court has upheld government aid to such religiously affiliated institutions as colleges and hospitals, where the aid might indirectly advance the religious mission, but where the institution itself was not "pervasively sectarian" in nature.

The leading cases have involved religiously affiliated colleges, where the Court has upheld government aid that was used for other than "specifically religious activity." See *Roemer* v. *Maryland Pub. Works Bd.*, 426 U.S. 736, 740-741, 759 (1976) (noncategorical grants to private colleges for other than "sectarian purposes"); *Hunt* v. *McNair*, 413 U.S. 734, 739 (1973) (state statute authorizing issuance of revenue bonds for construction of private college or university facilities "not to be used for sectarian instruction or as a place of religious worship, or in connection with any part of the program of a school or department of divinity"); *Tilton* v. *Richardson*, 403 U.S. 672, 675 (1971) (federal construction grants for private college or university facilities not "to be used for sectarian instruction or as a place of worship * * * or to be used primarily in connection with any part of the program of a school or department of divinity"). In these cases, the Court was not troubled, as the district court was here, by the fact that the institutions were religiously affiliated, or that there were various indicia of that affiliation present in the day-to-day operations of the schools. Rather, the Court made clear that if, when viewed in its entirety, an institution is not "so permeated with religion that the secular side can not be separated from the sectarian" (*Roemer*, 426

U.S. at 759), then governmental aid does not become impermissible due simply to church affiliation or control (*Hunt*, 413 U.S. at 743; *Tilton*, 403 U.S. at 686); the inclusion in the curriculum of matters of religious doctrine (*Tilton*, 403 U.S. at 680), or even compulsory courses on such subjects, (*Roemer*, 426 U.S. at 756); the employment by the university of clerics as teachers or in other positions (*Roemer*, 426 U.S. at 755); or the presence of prayer or religious practice as an integral part of university life (*id.* at 755-756). Provided that the assistance is not itself being used to advance an explicitly sectarian aspect of the institution's activities, it is clear under these cases that no impermissible effect of aiding religion arises where the institutions assisted are not pervasively sectarian. *Roemer*, 426 U.S. at 759; *Hunt*, 413 U.S. at 744; *Tilton*, 403 U.S. at 680-681.

The Court made much the same point in *Bradfield* v. *Roberts*, 175 U.S. 291 (1899), in upholding a grant of $30,000 to a hospital to be used for the construction of buildings. The hospital, which was operated by a sisterhood of the Roman Catholic Church, had previously been incorporated by an act of Congress, giving the hospital the power to provide "for the care of such sick and invalid persons as may place themselves under the treatment and care of the said corporation." Act of Apr. 8, 1864, ch. 50, § 2, 13 Stat. 44. The Court held that although the hospital was "conducted under the auspices of the Roman Catholic Church," which "exercise[d] great and perhaps controlling influence over the management of the hospital," the hospital's charter was limited to the purpose of operating a hospital (175 U.S. at 298). See *Roemer* v. *Maryland Pub. Works Bd.*, 426 U.S. at 746. Because the charter ensured that the hospital's mission was not fundamentally religious, the Court refused to inquire into "the individual beliefs upon religious matters of the various incorporators" (175 U.S. at 298). Even though "the influence of any particular church may be powerful over the members of a non-sectarian and secular corporation," the

Court stated, such influence was "surely not sufficient to convert such a corporation into a religious or sectarian body" (*ibid.*).

b. The district court thus made a critical error in failing to begin its inquiry "with a consideration of the nature of the institutions in which the programs operate" (*Grand Rapids Sch. Dist.* v. *Ball,* 473 U.S. at 384), and in proceeding instead as though all "religious organizations"—whether pervasively sectarian or not—are the same. That failure infects its analysis of both the facial and as-applied challenges to the statute.

Preliminary, we note that the district court recognized no clear analytical distinction between facial and as-applied challenges under the Establishment Clause (J.S. App. 4a). It concluded (*ibid.* (emphasis in the original)) that even if a "*possible* application [ ]" of the statute is "the only constitutionally offensive element to which the court has pointed," a court is nevertheless obligated to "strike down the statute on its face."

That method of examining a statute on its face, which the district court acknowledged (J.S. App. 4a) to be "different from that usually employed when considering constitutional claims," cannot be squared with this Court's explanation in *United States* v. *Salerno,* No. 86-87 (May 26, 1987), slip op. 5, that in mounting a facial challenge to a legislative Act, "the challenger must establish that no set of circumstances exists under which the Act would be valid." Cf. *City Council* v. *Taxpayers for Vincent,* 466 U.S. 789, 800 & n.19 (1984); *New York* v. *Ferber,* 458 U.S. 747, 773 (1982); *Hoffman Estates* v. *Flipside, Hoffman Estates,* 455 U.S. 489, 494 & n.5 (1982). Applying the appropriate standard, the AFLA is plainly constitutional on its face. Since the AFLA does not, on its face, require or suggest that the religious organizations participating in AFLA programs must be pervasively sectarian, one cannot simply assume that the Secretary will exercise his discretion to involve such groups in the program or that funds will be expended in an impermissibly religious manner. Without such an unwarranted assumption, the district court lacked any legitimate basis to find the statute invalid on its face.

The district court's "as applied" examination of the actual grantees fares no better, for here again the court neglected to determine whether individual grantees are pervasively sectarian.[24] The court began, instead, with the mistaken premise that all religious organizations are essentially the same. It casually asserted that "[t]he character and purpose of 'religious organizations' is self-evident. The definition of 'religious organizations' so clearly means organizations with a religious character and purpose that 'one would necessarily need to consult a lawyer to effectively misconstrue it.' " J.S. App. 40a (citation omitted).[25] With that all-embracing premise, the court apparently barred participation in the AFLA of all organizations with any religious identification or association, however remote. Compare *Hunt* v. *McNair,* 413 U.S. at 746-747 n.8 ("formal denominational control over a liberal arts college does not render all aid to the institution a violation of the Establishment Clause").

This cursory as-applied approach ignores the wide diversity in American religious life. See Note, *Developments in the Law—Religion and the State,* 100 Harv. L.

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[24] We believe that the district court erred when it held (J.S. App. 8a-12a) that appellees have standing as federal taxpayers to challenge the statute as applied. Under this Court's decision in *Valley Forge Christian College* v. *Americans United For Separation of Church & State, Inc.*, 454 U.S. 464 (1982), appellees' as-applied challenge fails because it is not " 'made to an exercise by Congress of its power under Art. I, § 8, to spend for the general welfare' " (454 U.S. at 479, quoting *Flast* v. *Cohen*, 392 U.S. 83, 103 (1968)), but rather is made to decisions by the Secretary about how to spend appropriated funds. Just as the plaintiffs in *Valley Forge* lacked standing to challenge "a decision by HEW to transfer a parcel of federal property" (454 U.S. at 479 (footnote omitted)), so, too, do appellees lack standing to challenge the individual spending decisions made by the Secretary in implementing the AFLA.

[25] At the oral argument on the government's Rule 59(e) motion seeking clarification of the meaning of "religious organizations" for

Rev. 1606, 1613 (1987). Religious organizations vary in structure, purpose, degree of affiliation, and commitment to a theological regime. They range in nature and mission from churches and parochial schools, whose functions include the propagation of religious doctrine, to social welfare organizations, which provide aid to the needy in a secular setting, without regard to religious orientation, and which are operated by professional staffs bound by ethical standards that preclude religious inculcation.

Largely for that reason, this Court has held that in order "[t]o answer the question whether an institution is so 'pervasively sectarian' that it may receive no direct state aid of any kind, it is necessary to paint a general picture of the institution, composed of many elements" (*Roemer*, 426 U.S. at 758). The Court has steadfastly refused to "strike down an Act of Congress on the basis of a hypothetical 'profile' " of the " 'typical sectarian' institution" (*Tilton* v. *Richardson*, 403 U.S. at 682). Instead, the Court has insisted that account be taken of a wide range of characteristics, including formal affiliation (*Roemer*, 426 U.S. at 755), institutional autonomy (*ibid.*; *Tilton*, 403 U.S. at 680), curriculum (*Roemer*, 426 U.S. at 756), hiring policies (*Roemer*, 426 U.S. at 757; *Hunt*, 413 U.S. at 743-744), source of program participants (*Roemer*, 426 U.S. at 757-758; *Hunt*, 413 U.S. at 743-744), and symbolic representations (*Tilton*, 403 U.S. at 680). Because the as-applied inquiry is intensively factual, the Court has explained that "[i]ndividual projects can be properly evaluated if and when challenges arise with respect to particular recipients and some evidence is then presented to show that the institution does in fact possess these [pervasively sectarian] characteristics" (*ibid.*). The district

purposes of the injunction, the district court insisted that it was "not going to get * * * in th[e] game" of "defin[ing] what constitutes a religion or religious organization" (8/11/87 Tr. 35-B). The court invited counsel to "go do the research" on what "religious organizations" means for purposes of the order, noting that "[t]here are a multitude of statutes and regulations that define what that constitutes" (*id.* at 36, 41).

court's concept of a "religious organization," which requires no "more than a formalistic church relationship" (*Hunt* v. *McNair*, 413 U.S. at 746-747 n.8), cannot be sustained.[26]

Moreover, in the several instances in which the court at least inquired into the sectarian nature of a particular grantee, it made obvious legal and factual errors.[27] It faulted St. Ann's Infant and Maternity Home, for example, because its affiliation with the Catholic Archdiocese prohibits it from "counsel[ing] or refer[ring] patients for abortions" (J.S. App. 34a). The court likewise found Family of the Americas Foundation an inappropriate grantee, because it was "inspired" by a religious doctrine opposing abortion (*id.* at 35a). But the statute itself imposes the same restriction on the funded programs (see 42 U.S.C. 300z-3(b)(1), 300z-10(a)), and it is hard to see why grantees that obey the restrictions on abortion services have impermissibly promoted religion, merely because the grantees are agreeable to the restrictions by virtue of their religious beliefs.[28]

The court also noted that in certain cases AFLA grantees had conducted programs "on sites adorned with religious symbols" (J.S. App. 36a). But while some grantees did hold occasional community outreach pro-

[26] Unfortunately, the present record does not now permit such an individualized analysis, because all but one of the religiously-affiliated groups analyzed by the district court are no longer receiving federal funds.

[27] Although appellees submitted evidence with respect to 23 AFLA grantees, and the Secretary offered evidence with respect to 60 grantees, the district court, stating that it would "not engage in an exhaustive recitation of the record" (J.S. App. 33a), focused on no more than a handful of the funded programs (see *id.* at 33a-38a).

[28] The court's treatment of St. Margaret's Hospital is flawed for the same reason, for it is not at all clear why a facility that is "committed to acting 'in harmony with the teaching of the Catholic Church' " (J.S. App. 33a) will advance religion in a manner not contemplated by the purely secular restrictions dictated by the statute.

grams at local churches and parochial schools, the same grantees also held meetings at public schools and in other secular settings (J.A. 455, 456, 485, 576). Taken as a whole, these particular programs did not have the primary effect of advancing religion, simply because they involved some outreach sessions that were conducted in local religious facilities.[29] The Court's decisions make clear that not all association between publicly sponsored activities and religious symbolism or references must be avoided. *E.g., Lynch* v. *Donnelly,* 465 U.S. 668 (1984) (creche); *Marsh* v. *Chambers,* 463 U.S. 783 (1983) (opening prayer in state legislature); Cf. *Tilton,* 403 U.S. at 681. Rather, such symbolism is, at most, a factor for a court to consider in evaluating the pervasively sectarian nature of the institution involved. See *Lemon* v. *Kurtzman,* 403 U.S. at 615-616.

2. Even in the absence of a finding of assistance to a pervasively sectarian organization, a court must strike down a program of governmental aid where it is channeled

[29] In granting summary judgment in appellees' favor, the district court essentially overlooked our submissions of material facts, finding that we had failed to follow the procedural formalities of Fed. Dist. Ct. Local R. 108(h). That rule requires the moving party to file a statement of material facts with its memorandum of points and authorities. The opposing party may then file an opposition, setting forth facts as to which there is a genuine dispute. Both sides in this case moved for summary judgment and both submitted multi-volume statements of material facts, memoranda in support, and oppositions. We are unable to discern a meaningful difference between the two sides' papers, and thus we cannot fathom the district court's apparent unwillingness to consider the facts that we submitted.

We also believe that while ordinarily the court's quite arbitrary reliance on perceived technical pleading irregularities would not raise an issue for this Court's consideration, where, as here, the constitutionality of an Act of Congress is at issue, these supposed irregularities should not preclude this Court's consideration and undermine its mandatory appellate jurisdiction.

to "a specifically religious activity in an otherwise substantially secular setting" (*Hunt* v. *McNair,* 413 U.S. at 743). The district court made no such inquiry in this case, however, having already invalidated the statute under its novel "direct and immediate" test. No such finding could have been made in any event. By its terms, the statute provides support for demonstration projects that provide care or prevention services (42 U.S.C. 300z-3(a)(1)). The projects involve such facially neutral services as "pregnancy testing" (42 U.S.C. 300z-1(a)(4)(A)), "adoption counseling and referral services" (42 U.S.C. 300z-1(a)(4)(B)), "prenatal and postnatal care" (42 U.S.C. 300z-1(a)(4)(C)), and referrals to pediatric, mental health, residential care, or maternity home services (42 U.S.C. 300z-1(a)(4)(F), (I) and (J)). The Secretary has also taken pains to ensure that AFLA funds are used only for the secular objects mandated by the statute, and includes in the grant awards a careful proscription against engaging in religious activity (see J.A. 757, 759, 761). And, where appropriate, the Secretary has acted to eliminate departures from the secular terms of the grant by individual grantees (see p. 41, *infra*).

The district court noted (J.S. App. 27a-28a) that several of the services funded under the AFLA involve "education" or "counseling" of adolescents. This Court's cases, however, do not permit the presumption—implicitly indulged by the district court—that all religiously affiliated organizations are incapable of carrying out such functions in a lawful, secular manner. In *Roemer* v. *Maryland Pub. Works Bd.,* 426 U.S. 736 (1976), for example, a plurality of the Court upheld noncategorical grants to colleges, among them religiously affiliated colleges, under a statute that simply stipulated that none of the funds could be used for sectarian purposes (*id.* at 755-758). In light of the statutory proscription, the Court was unwilling to assume (as the district court did in the present case) that the recipients would use the funds to promote " 'specifically

religious activity' " (*id.* at 759 (quoting *Hunt* v. *McNair*, 413 U.S. at 743)). The Court emphasized in *Roemer* that it "must assume that the colleges * * * will exercise their delegated control over use of the funds in compliance with the statutory, and therefore the constitutional, mandate" (426 U.S. at 760). And in marked contrast to the approach taken by the court below, the Court cautioned (*id.* at 761) that "[i]t has not been the Court's practice, in considering facial challenges to statutes of this kind, to strike them down in anticipation that particular applications may result in unconstitutional use of funds." Accord *Tilton* v. *Richardson*, 403 U.S. at 682.[30]

The district court also noted (J.S. App. 28a) that the AFLA supports education programs that touch on "matters [that] are fundamental elements of religious doctrine." But issues of public importance are frequently the subject of both secular and theological concern, and the Establishment Clause is not violated simply because a matter "happens to coincide or harmonize with the tenets of some or all religions." *McGowan* v. *Maryland*, 366 U.S. 420, 442 (1961). Accord *Lynch* v. *Donnelly*, 465 U.S. at 682;

[30] The fact that the statute itself "contains no restriction whatsoever against the teaching of religion *qua* religion" (J.S. App. 29a) does not change the analysis. First, the statute does not contemplate, let alone authorize religious inculcation. Its failure to go further and explicitly forbid conduct that would have presented a clear Establishment Clause violation at the time the statutes were enacted does not make a constitutional difference. See *Bradfield* v. *Roberts*, 175 U.S. 291 (1899).

In any event, as the district court acknowledged (J.S. App. 29a n.13), the Secretary's "Notice of Grant Award" instructs grantees that they may not use the appropriated funds to inculcate religion (see, *e.g.*, J.A. 757, 759, 761). The Secretary has also taken steps to eliminate abuses, including terminating one of the grants (see J.A. 742-743). This Court has approved administrative action as one means of policing governmental programs under the Establishment Clause (see, *e.g.*, *Tilton*, 403 U.S. at 675, 680; *Hunt* v. *McNair*, 413 U.S. at 739-740).

id. at 715-716 (Brennan, J., dissenting); *Marsh* v. *Chambers*, 463 U.S. 783, 792 (1983); *Harris* v. *McRae*, 448 U.S. 297, 319 (1980).

The district court professed particular concern (J.S. App. 29a-30a) about the abortion restrictions imposed by the statute, noting (*id.* at 30a) that "[i]t is a fundamental tenet of many religions" that abortion is wrong, and surmising that it is "simply unrealistic" to presume that AFLA counselors "can put their beliefs aside when counseling an adolescent" (*ibid.*). We agree that abortion is a central concern of many religious faiths. It is equally true, however, that abortion can be discussed in purely secular terms.[31] The question, in our view, is not whether abortion (or any other matter involved in AFLA services) is *capable* of being discussed in religious terms. Indeed, it is difficult to conceive of any issue addressed by government or society at large that it not susceptible to religious instruction.[32] The issue is, instead, whether a particular

[31] Compare J. Thomson, *A Defense of Abortion*, in 1 Phil. & Pub. Aff. 47 (1971); M. Tooley, *In Defense of Abortion and Infanticide, reprinted in The Problem of Abortion* 120 (J. Feinberg 2d ed. 1984); Greenawalt, *Religiously Based Premises and Laws Restrictive of Liberty*, 1986 B.Y.U. L. Rev. 245, 265-266, with *Harris* v. *McRae*, 448 U.S. at 319 (the Hyde Amendment restriction on abortion funding "is as much a reflection of 'traditionalist' values towards abortion, as it is an embodiment of the views of any particular religion"); J. English, *Abortion and the Concept of a Person, reprinted in The Problem of Abortion, supra*, at 151; J. Noonan, *An Almost Absolute Value in History, reprinted in The Problem of Abortion, supra*, at 9; S. Bok, *Ethical Problems of Abortion, reprinted in The Problem of Abortion, supra*, at 188.

[32] Arguments rooted in religious belief have been advanced in connection with such varied issues as nuclear deterrence (see, *e.g.*, J. Cameron, *Is Nuclear Deterrence Moral?*, in 34 N.Y. Rev. of Books 38-43 (Nov. 5, 1987)); foreign affairs (see J. Benestad & F. Butler, *Quest for Justice: A Compendium of the United States Catholic Bishops on the Political and Social Order, 1966-1980* (1981) (cited in A. Reichley, *Religion in American Public Life* 290 (1985)); and domestic policy (see *ibid.*).

participant in a governmental program must be presumed to be *unable* to convey that subject in lawful, secular terms. Outside the context of a pervasively sectarian institution, there is no authority in this Court's cases for presuming that religiously affiliated organizations will deliver otherwise secular services in a manner that makes them specifically religious.

3. Instead of inquiring whether AFLA funds have been used to endow "pervasively sectarian" institutions or to support "specifically religious activities," the district court applied a test of its own making. It stated that whenever "the connection between religion and the challenged government statute or practice is clear from the face of the statute," the court need only determine whether that statute has the "direct and immediate" effect of advancing religion (J.S. App. 25a).

This approach is entirely unprecedented. None of the cases relied on by the district court announce any such departure from the *Hunt* standard.[33] And while this Court has referred to the "direct and immediate" effect of a governmental action, it has used those terms to describe the inquiry that must be made *after* a court determines

[33] The court relied on four cases (J.S. App. 24a), but none of them is remotely on point. *Estate of Thornton* v. *Caldor, Inc.*, 472 U.S. 703 (1985), *Lynch* v. *Donnelly*, 465 U.S. 668 (1984), and *Larkin* v. *Grendel's Den, Inc.*, 459 U.S. 116 (1982), did not involve government grants (direct or indirect) to religious institutions, and thus the Court in those cases had no occasion to consider the *Hunt* standard for assessing primary effect. The remaining case, *Committee for Pub. Educ. and Religious Liberty* v. *Nyquist*, 413 U.S. 756 (1973), did involve government financial assistance to religious institutions, and struck it down on the ground (*id.* at 779-780) that its "effect, inevitably, is to subsidize and advance the religious mission of sectarian schools." The *Nyquist* case, like the three others cited by the district court, did not even advert to a "direct and immediate" test, let alone employ such a test as an alternative to considering the sectarian nature of the assisted institutions.

that the assistance in question has gone to a pervasively sectarian organization. In particular, the Court has held that even a pervasively sectarian institution may receive governmental assistance where that aid is only "incidental" and not "direct" or "substantial." See, *e.g.*, *Grand Rapids Sch. Dist.* v. *Ball*, 473 U.S. 373, 394 & n.12 (1985); *Meek* v. *Pittenger*, 421 U.S. 349, 371 n.21 (1975); *Committee for Pub. Educ. and Religious Liberty* v. *Nyquist*, 413 U.S. 756, 771, 775 (1973). The district court simply omitted the initial step in the analysis, by invalidating direct or immediate aid to "religious organizations," without first considering whether any of them were pervasively sectarian.[34]

The district court's approach in this case implements a form of "religious gerrymander[ ]" (*Walz* v. *Tax Comm'n*, 397 U.S. 664, 696 (1970) (Opinion of Harlan, J.)), under which religious organizations are singled out for exclusion from participation in various national programs, without regard to their particular beliefs or the nature of their affiliation. The district court's reasoning would prohibit Congress from recognizing and accommodating the reality that religious organizations constitute a major portion of the private sector entities engaged in providing social services to those in need. To ensure the success of its pro-

[34] Moreover, the district court's approach—which begins by asking whether a statute explicitly refers to "religious organizations"—does not answer the relevant question under the effects test: whether "the government itself has advanced religion through its own activities and influence" (*Amos*, slip op. 8 (emphasis omitted)). That requires a much more probing inquiry of the nature and conduct of particular organizations, and cannot plausibly turn on the simple fact that the text of the statute mentions religious organizations. While a decision by a legislature to include religious organizations in the text of a statute may, in highly unusual circumstances, suggest that it lacked a secular *purpose* in passing the legislation (cf. *Wallace* v. *Jaffree*, 472 U.S. at 58-59), for the reasons stated by the district court (J.S. App. 17a-22a), no such inference may be drawn in this case. See pp. 23-25, *supra*.

grams, and in fairness to those whose religious beliefs motivate them to participate in social services, Congress must be allowed to cast its net widely, and not to exclude a vast and uniquely effective segment of the nation's charitable and social network. The court's broad rule exhibits a systematic "hostility" to religion (*Lynch* v. *Donnelly*, 465 U.S. at 673), since it bars religious organizations of all kinds from participating in the AFLA programs—regardless of whether they are grantees, sub-grantees, or non-funded participants; regardless of whether they perform a counseling function or not; regardless of whether they offer care or prevention services; regardless of the premises on which their work is done; regardless of whether their role consists of nothing more than referring troubled teenagers to funded programs elsewhere; and regardless of how faithfully they have previously discharged the secular purposes of the statute. That hostility offends the First Amendment, for just as the government may not endorse or exhibit a preference for a particular religion, or for religion in general (*Lynch*, 465 U.S. at 690 (O'Connor, J., concurring)), neither may it diminish one's "standing in the political community" on account of religious belief (*id.* at 687). See *Abington Sch. Dist.* v. *Schempp*, 374 U.S. 203, 306 (1963) (Goldberg, J., concurring); *Zorach* v. *Clauson*, 343 U.S. 306, 314 (1952); *Illinois ex rel. McCollum* v. *Board of Educ.*, 333 U.S. 203, 211-212 (1948). Moreover, a policy that invites the participation of private organizations generally, but advises that religious organizations "need not apply," would raise serious equal protection issues. See *Widmar* v. *Vincent*, 454 U.S. 263, 274-275 (1981); *Roemer* v. *Maryland Pub. Works Bd.*, 426 U.S. at 746 n.13.

4. We do not contend that there were no departures from proper constitutional principles in individual AFLA programs. The district court correctly found (J.S. App. 36a-37a) that Catholic Charities of Arlington held AFLA classes in religious settings and that its inclusion of religious discussions at the conclusion of otherwise secular AFLA programs raises serious concerns. In another case, a grantee (SUMA) proposed to "include[ ] 'spiritual counseling' in its AFLA program" (*id.* at 36a), while another grantee (St. Margaret's) did at one point use curricula that "included explicitly religious materials" (*ibid.*).

Such departures are not representative of the many different programs funded under the AFLA, including those in which religious organizations participated. And these departures do not justify a holding that the AFLA is unconstitutional when applied to the larger number of programs that were in full compliance with the law. Still less do they warrant a finding that the Act is invalid on its face. "A possibility always exists, of course, that the legitimate objectives of any law or legislative program may be subverted by conscious design or lax enforcement. But judicial concern about these possibilities cannot, standing alone, warrant striking down a statute as unconstitutional." *Tilton* v. *Richardson*, 403 U.S. at 679. In *Tilton* the Court found it sufficient that the statute directed that funds be used for secular purposes only; and while in *Tilton*, as here, departures had apparently taken place, the Court was satisfied that "the record show[ed] that some church-related institutions ha[d] been required to disgorge benefits for failure to obey" the restrictions on the grant (*id.* at 680).

Finally, where there were departures from proper constitutional practice, they were met by firm action by the Secretary. The Secretary terminated the Arlington program, advised SUMA that its counseling program was "not legally permissible" and should be revised accordingly, and notified St. Margaret's that it must eliminate religious material from its program because "teach[ing] or promot[ing] the views of a particular religion is impermissible under the First Amendment" (see J.A. 517-519, 675-676, 742-743).

C. The AFLA Does Not Foster Excessive Entanglement With Religion

In *Lemon* v. *Kurtzman,* 403 U.S. at 615, this Court observed that "[i]n order to determine whether the government entanglement with religion is excessive, we must examine the character and purposes of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and the religious authority." In subsequent cases, the Court has made clear that the first factor—the nature of the institution—is critical to the inquiry. Indeed, to our knowledge, the Court has never found excessive entanglement where the recipient of governmental funds was not a church or a parochial school. Because the district court here steadfastly refused to focus on the nature of the specific institutions involved, or to recognize any distinctions among the types of "religious organizations" that may participate in AFLA programs, it misapplied the entanglement doctrine.

1. This Court first applied the entanglement doctrine in *Lemon* v. *Kurtzman,* 403 U.S. 602 (1971), striking down Rhode Island and Pennsylvania programs that reimbursed parochial schools for the cost of teacher salaries and related educational expenses. The Court noted at length (*id.* at 615-616, 620) the features of the respective schools that posed a "grave potential for excessive entanglement" (*id.* at 615). The Rhode Island schools were "located close to parish churches"; contained "identifying religious symbols"; maintained "religiously oriented extracurricular activities"; drew two-thirds of their teachers from various religious orders; and, in general, "constituted 'an integral part of the religious mission of the Catholic Church' " (*id.* at 615-616). The Pennsylvania schools were likewise "controlled by religious organizations, ha[d] the purpose of propagating and promoting a particular religious faith, and conduct[ed] their operations

to fulfill that purpose" (*id.* at 620). Moreover, the aid in question involved teachers, and the Court observed that while "a textbook's content is ascertainable, * * * a teacher's handling of a subject is not" (*id.* at 617). As the Court put it (*id.* at 618), "[w]e need not and do not assume that teachers in parochial schools will be guilty of bad faith or any conscious design to evade the limitations imposed by the * * * First Amendment. We simply recognize that a dedicated religious person, teaching in a school affiliated with his faith or her faith and operated to inculcate its tenets, will inevitably experience great difficulty in remaining religiously neutral." The central concern was thus the pervasively sectarian environment.

Aguilar v. *Felton,* 473 U.S. 402 (1985), the Court's most recent application of the entanglement doctrine, confirms that only in pervasively sectarian settings is the entanglement dilemma presented. In *Aguilar* the Court held unconstitutional a New York City program under which Title I educational services were provided on the premises of local parochial schools to meet the needs of educationally deprived children is such areas as remedial reading and mathematics, English as a second language, and guidance counseling. The Court noted two "critical elements" of entanglement that were present in the case. First, "the aid is provided in a pervasively sectarian environment." Second, "because assistance is provided in the form of teachers, ongoing inspection is required to ensure the absence of a religious message." *Id.* at 412. As a result, the Court concluded (*id.* at 413): "This pervasive monitoring by public authorities in the sectarian schools infringes precisely those Establishment Clause values at the root of the prohibition of excessive entanglement * * *. In short, the religious school, which has as a primary purpose the advancement and preservation of a particular religion, must endure the ongoing presence of state personnel whose

primary purpose is to monitor teachers and students in an attempt to guard against the infiltration of religious thought."

The Court went on in *Aguilar* to note precisely why this state of affairs is unacceptable (473 U.S. at 414): "The numerous judgments that must be made by agents of the city concern matters that may be * * * of deep religious significance to the controlling denominations. * * * At the same time, 'the picture of state inspectors prowling the halls of parochial schools and auditing classroom instruction surely raises more than an imagined spector of governmental "secularization of a creed."' *Lemon* v. *Kurtzman,* 403 U.S. at 650 (opinion of Brennan, J.)."

Where institutions are not pervasively sectarian, on the other hand, the entanglement concerns articulated by the Court are unwarranted. The Court has routinely rejected entanglement claims in such cases. See, *e.g., Roemer* v. *Maryland Pub. Works Bd.*, 426 U.S. 736 (1976); *Hunt* v. *McNair,* 413 U.S. 734 (1973); *Tilton* v. *Richardson,* 403 U.S. 672 (1971). See also *Wolman* v. *Walter,* 433 U.S. 229, 246-248 (1977). Two factors may explain those different results.

First, where the grantee is not pervasively sectarian, it cannot be said that surveillance by the government (to ensure compliance with the terms of the grant) is an "intrusion * * * into the precinct[]" of the Church (*Lemon,* 403 U.S. at 614).[35] Where no pervasively sectarian grantee is involved, the government's monitoring of the grantee is just that—monitoring—precisely the sort of supervision

[35] As the Court put the matter in *NLRB* v. *Catholic Bishop,* 440 U.S. 490, 501 (1979), "[t]he key role played by teachers in * * * a [church-operated] school system has been the predicate for our conclusions that governmental aid channeled through teachers creates an impermissible risk of excessive governmental entanglement in the affairs of the church-operated schools."

that the government exercises in its many other grant programs. See *Roemer* v. *Maryland Pub. Works Bd.*, 426 U.S. at 764.

Second, where the recipient of government funds is not pervasively sectarian, there is also a sharply reduced basis for presuming that the grantee will violate the terms of the grant by inculcating religious doctrine. A plurality of this Court made that point in *Roemer* v. *Maryland Pub. Works Bd., supra.* It observed that the institutions in question, while religiously affiliated, were not pervasively sectarian and concluded that that factor was "important for purposes of the entanglement test because it means that secular activities, for the most part, can be taken at face value. There is no danger, or at least only a substantially reduced danger, that an ostensibly secular activity * * * will be infused with religious content or significance. The need for close surveillance of purportedly secular activities is correspondingly reduced" (426 U.S. at 762). Accord *Tilton* v. *Richardson,* 403 U.S. at 687.[36]

2. In deciding the entanglement question in this case, the district court did not consider whether the AFLA grantees (or any one of them, for that matter) are pervasively sectarian. It was enough for the court that "religious organizations"—broadly defined to include af-

[36] The Court in *Hunt* v. *McNair,* 413 U.S. 734 (1973), suggested (*id.* at 747-749) that, apart from the sectarian nature of the grantees, there might be a separate entanglement problem if the government "bec[a]me deeply involved in the day-to-day financial and policy decisions" of a religiously affiliated grantee. We know of no case, however, in which the Court has upheld an entanglement claim in the absence of a finding that the recipient of government funds was a pervasively sectarian institution. And the decision in *Aguilar* confirms (473 U.S. at 412) that the presence of a pervasively sectarian setting is one of the two "critical elements" of a finding of excessive entanglement. Accord *Roemer* v. *Maryland Pub. Works Bd.*, 426 U.S. at 764-765.

filiated institutions of all stripes – were participants in the programs and that education and counseling activities were involved. But this Court has always begun its inquiry by examining the nature of the particular entities involved in the program, and it has never found a grant program impermissibly entangling where a grantee, although religiously affiliated, was not pervasively religious. The district court's failure to make any finding about the sectarian nature of the many types of "religious organizations" involved in the AFLA programs requires that its judgment be reversed.[37]

CONCLUSION

The judgment of the district court should be reversed.

Respectfully submitted.

CHARLES FRIED
Solicitor General

RICHARD K. WILLARD
Assistant Attorney General

DONALD B. AYER
Deputy Solicitor General

ROBERT J. CYNKAR
Deputy Assistant Attorney General

LAWRENCE S. ROBBINS
Assistant to the Solicitor General

MICHAEL JAY SINGER
JAY S. BYBEE
Attorneys

JANUARY 1988

[37] Even if there might be entanglement problems in cases of some religious organizations that are not pervasively sectarian, plainly the degree of religious affiliation is highly relevant to the entanglement inquiry. See, *e.g.*, *Aguilar*, 473 U.S. at 412. By failing to make any judgment at all on the issue, the district court simply did not come to grips with the entanglement doctrine as this Court has articulated it.

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Nos. 87-253 *et al.*

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES,
Appellant,
v.
CHAN KENDRICK, *et al.*

On Appeal From the United States District Court for the District of Columbia

BRIEF OF UNITED FAMILIES OF AMERICA

MICHAEL W. MCCONNELL
1111 E. 60th Street
Chicago, IL 60637
(312) 702-3306
Counsel of Record

EDWARD R. GRANT
JAMES MICHAEL THUNDER
CLARKE D. FORSYTHE
AMERICANS UNITED FOR LIFE
LEGAL DEFENSE FUND
343 S. Dearborn Street Rm. 1804
Chicago, IL 60604
(312) 786-9494

PAUL ARNESON
1701 Pennsylvania Ave., Suite 940
Washington, D.C. 20006
(202) 785-0530

MICHAEL J. WOODRUFF
MICHAEL STOKES PAULSEN
c/o CENTER FOR LAW &
RELIGIOUS FREEDOM
P.O. Box 1492
Merrifield, VA 22116
(703) 560-7314

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QUESTION PRESENTED

Whether Congress may involve religiously-affiliated organizations, "as appropriate," along with other charitable organizations, voluntary associations, and private sector groups, in a grant program designed to support projects to discourage adolescent pregnancy and to provide care for pregnant adolescents. See the Adolescent Family Life Act, 42 U.S.C. (& Supp. III) 300z *et seq.*

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, United Families of America was defendant-intervenor in the district court and is appellant in No. 87-775; Sammie J. Bradley and Katherine K. Warner were defendants-intervenors in the district court; and Reverend Robert E. Vaughn, Reverend Lawrence W. Buxton, Dr. Emmett W. Cocke, Jr., Shirley Pedler, Reverend Homer A. Goddard, Joyce Armstrong, John Roberts, and the American Jewish Congress were plaintiffs in the district court, are appellees in Nos. 87-253, 87-431, and 87-775, and are cross-appellants in No. 87-462.

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OPINIONS BELOW

The April 15, 1987 opinion of the district court is reported at 657 F. Supp. 1547 (D.D.C. 1987). It is reproduced as Appendix A to the Jurisdictional Statement in No. 87-431 (U.S. J.S. App. 1a-46a). The September 13, 1987 final judgment of the district court is unreported. It is reproduced as Appendix D to the Jurisdictional Statement in No. 87-431 (U.S. J.S. App. 52a-55a).

JURISDICTION

On May 15, 1987, the Solicitor General filed a notice of appeal in No. 87-253 from an interlocutory order of the district court issued April 15, 1987. On July 7, 1987, the Chief Justice extended the time within which to docket that appeal to and including August 13, 1987, and the appeal in 87-253 was docketed on that date. On August 13, 1987, the district court issued a final order and opinion, incorporating the April 15, opinion, severing the term "religious organizations" from the AFLA "in all places that it appears," and permitting continued AFLA funding to non-religious organizations (U.S. J.S. App. 52a-55a). The Solicitor General filed a notice of appeal from that order on August 20, 1987, and docketed the appeal in No. 87-431 on September 14, 1987.

Kendrick, et al., filed a notice of conditional cross-appeal on August 25, 1987, and docketed the cross-appeal in No. 87-462 on September 16, 1987. On November 9, 1987, this Court noted probable jurisdiction in Nos. 87-253, 87-431, and 87-462. On September 12, 1987, United Families of America filed a notice of appeal from the court's final judgment of August 13, 1987, and docketed the appeal in No. 87-775 on November 10, 1987. This Court has jurisdiction pursuant to 28 U.S.C. 1252 (1982).[1]

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[1] This brief constitutes United Families of America's opening brief as appellee in support of appellant in Nos. 87-253 and 87-431. Should this Court note probable jurisdiction in No. 87-775, this

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Adolescent Family Life Act, 42 U.S.C. 300z *et seq.*, and the First Amendment of the United States Constitution.

STATEMENT OF THE CASE

1. In 1981, Congress enacted the Adolescent Family Life Act ("AFLA") as Title XX to the Public Health Service Act, Pub.L.No. 97-35, 95 Stat. 578 (1981). The purposes of the Act are to help adolescents "within the context of the family," to "promote self discipline and other prudent approaches" to adolescent pregnancy, to "promote adoption as an alternative," to promote the delivery of care services, to encourage research and demonstration projects, to support "evaluative research," and, finally, to "encourage and provide for the dissemination of results" from the projects. 42 U.S.C. 300z(b).

The AFLA "authorizes appropriations for demonstration grants to individuals, public and nonprofit entities for services and research in the area of premarital adolescent sexual relations and pregnancy." S. Rep. 97-161, 97th Cong., 1st Sess. 1 (1981). Three types of activity may be undertaken by grantees: "care services," "prevention services," and research. Care services include such services as adoption assistance, pediatric care or referral, maternity homes, educational and vocational services, child care, and homemaking assistance and education. Prevention services include such services as family-oriented approaches to teenage sexuality, pregnancy testing, nutritional services, and transportation. See generally H.R. Rep. 99-1022, 99th Cong., 2d Sess. 335 (1986). Plaintiffs-appellees do not challenge the research component of the AFLA.

No grants under the AFLA may be made for projects that provide abortion, abortion counseling, or abortion referral (unless such referral is requested by the adolescent and her parent or guardian),[2] and AFLA funds may not be used for the provision of family planning services (unless such services are otherwise unavailable in the community). 42 U.S.C. 300z-10(a); *id.*, § 300z-3(b)(1).

brief will constitute United Families of America's opening brief as appellant.

The AFLA requires each applicant for a grant to describe how it will involve in the program, "as appropriate in the provision of services, . . . religious and charitable organizations, voluntary associations, and other groups in the private sector as well as services provided by publicly sponsored initiatives" 42 U.S.C. 300a-5(a)(21)(B). In practice, at most 23 of the 100 grantees have been religiously affiliated. *Compare* J.A. 748-54 *with* 755-56. (This figure includes 4 state or local government agencies cited by the district court for religious involvement).

The authorizing committee stated that "the use of Adolescent Family Life Act funds to promote religion, or to teach the religious doctrines of a particular sect, is contrary to the intent of this legislation." S. Rep. 98-496, 98th Cong., 2d Sess. 10 (1984).[3] Pursuant to his

[2] This section "consolidated and clarified" the prohibition on "abortion related activities under prior law." H. Conf. Rep. No. 97-208, 97th Cong. 1st Sess. (1981) *reprinted in* [1981] U.S. Code Cong. & Admin. News 1010, 1178-79.

[3] The conferees stated that in reaching agreement "they have not addressed many of the difficult issues that surround" the AFLA and "note their intention to examine these issues in comprehensive and balanced hearings during the 99th Congress." H.R. Conf. Rep. 98-1154, 98th Cong., 2d Sess. 3 (1984). It therefore directed that "the reports filed to accompany H.R. 5600 and S. 2616 [including S. Rep. 98-496] not be considered as legislative history for the purposes of interpreting either this conference agreement of [sic] the Adolescent Family Life Act." *Ibid.* Since that time, no hearings have been held and the AFLA has continued to be funded by Congress. We doubt seriously that the Conference Committee's reservations went to the issues of prohibiting the promotion or teaching of religion or the neutrality of distribution of funds—the only issues pertinent here—and in any event, we believe S. Rep. 98-46 is the best available evidence of congressional thinking at

delegated authority, the Secretary attaches some 12 conditions to each AFLA grant, including the following:

> 7. The grantee will not teach or promote religion in the AFL Title XX program. The program shall be designed so as to be, to the extent possible, accessible to the public generally.

J.A. 757, 759, 761 (grant conditions for 1984-86). On at least one occasion, a religious organization was dropped from the program for violation of this condition. J.A. 742-43 (Catholic Charities of Arlington).

In initiating the AFLA program in 1981 and in reauthorizing it in 1984, Congress considered possible conflicts with the Establishment Clause and concluded that the program comported with Constitutional standards. S. Rep. No. 97-161, 97th Cong., 1st Sess. 15-16 (1981); S. Rep. 98-496 at 9-10. "Religious affiliation is not a criterion for selection as a grantee under the adolescent family life program, but any such grants made by the Secretary would be a simple recognition that nonprofit religious organizations have a role to play in the provision of services to adolescents." S. Rep. 97-161, at 15-16.

2. Appellees Chan Kendrick, et al. (hereafter "plaintiffs-appellees"), filed this action against the Secretary of Health and Human Services on October 27, 1983, pursuant to 28 U.S.C. 1331. United Families of America ("UFA") intervened in the district court and participated as a defendant-intervenor in support of the constitutionality of the AFLA. UFA is an organization with members who are parents of minor children eligible for services provided under the AFLA. Intervention was sought on the ground that the relief requested by the plaintiffs would diminish the range, diversity, and effectiveness of programs available to UFA's members. See Memorandum in Support of Motion to Intervene (filed

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the time of reauthorization. S. Rep. 97-161, 97th Cong., 1st Sess. (1981), which accompanied the initial authorization, is fully authoritative and does not differ in any essentials from the 1984 report.

Oct. 2, 1984); 87-775 J.S. App. B (order granting UFA's motion to intervene).

Finding "that the material facts are not in dispute and that summary judgment is appropriate" (U.S. J.S. App. 7a-8a), the district court held that the AFLA was unconstitutional on its face and as applied "*insofar as it involves religious organizations in carrying out the purposes of the Act*" and declared that "the involvement of religious organizations as AFLA grantees or subgrantees is unconstitutional." (U.S. J.S. App. 2a, n.2. (emphasis in original)).

The court found that the AFLA had a secular purpose (U.S. J.S. App. 17a-22a), but held that the statute on its face has a primary effect of advancing religion because "of its use of religious organizations for educating and counseling of teenagers on matters relating to religious doctrine" (U.S. J.S. App. 22a, 27a). Referring to several instances in which individual grantees allegedly used AFLA funds for religious purposes, the court also held that the AFLA is unconstitutional as applied. *Id.* at 32a-38a. The court did not, however, make findings that any more than a few of the grantees had been involved in these practices.

As a final basis for invalidation, the court held that the AFLA fostered an excessive entanglement between church and state. Because the religious organizations that were funded "have a religious character and purpose, the risk that AFLA funds will be used to transmit religious doctrine can be overcome only by government monitoring so continuous that it rises to the level of excessive entanglement" (U.S. J.S. App. 40a). The court declined, however, to determine which, if any, of the grantees were "pervasively sectarian" under this Court's definition. U.S. J.S. App. 24a-25a; see also *id.* at 54a-55a.

On August 13, 1987, the court issued a final opinion and order, severing the term "religious organizations" from the AFLA and barring such organizations from

participation in AFLA programs. The court stated that the "AFLA is fully and constitutionally operative as law in a manner consistent with the intent of Congress absent its references to 'religious organizations.'" U.S. J.S. App. 54a. The court also declined to clarify what it meant by the term "religious organizations," stating that there is "ample precedent in numerous statutes and federal regulations defining the term." *Id.* at 55a. The order also dismissed the case from its docket. *Ibid.*

INTRODUCTION AND SUMMARY OF ARGUMENT

This is the first case since *Bradfield v. Roberts*, 175 U.S. 291 (1899), in which this Court is asked to determine whether, and on what terms and conditions, religiously-affiliated organizations may participate in government-funded social welfare programs outside the area of elementary, secondary, and higher education. This case will affect hundreds of federal, state, and local programs in which religiously supported, inspired, or affiliated private groups are involved with the government in carrying out charitable social welfare activities.

The precise question is whether religiously affiliated organizations may participate as grantees in the Adolescent Family Life Act, 42 U.S.C. (& Supp. III) 300z *et seq.*, a federal program that funds public and private community-based efforts to deal with the problem of teenage pregnancy.[4] Congress has determined that "nonprofit religious organizations have a role to play in the provision of services to adolescents" (S. Rep. 97-161, at 15-16) and has directed the Secretary to make grants to a broad spectrum of charitable and voluntary associations, both religious and nonreligious.

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[4] This case also directly affects state programs similar to the AFLA. See Maine LD 1682 (June, 1987); Wis. Stat. Ann. § 46.93 (1987), as amended by 1987 Wis. Act 27, § 863br, reprinted in Wis. Legis. Serv. No. 2, at 207 (West 1987). See H.R. Rep. 99-1022, 99th Cong., 2d Sess. (1986) (state-by-state survey of teen pregnancy programs).

The district court, disregarding *Bradfield* and the long-standing historical precedent of church-state interaction in the social welfare field, has adopted an extreme and unsettling construction of the Establishment Clause. According to the court, when the government chooses to move into a social welfare field previously left to private charitable endeavor, it *must* single out and exclude religiously affiliated, even religiously inspired, organizations simply because their religious mission coincides with the purposes of the governmental program. Under the district court's order, organizations are excluded from the AFLA not because they have violated the rules of the program or used government funds for religious functions, but simply because of their beliefs—their affiliation or religious inspiration. Far from being neutral, this approach uses the fiscal muscle of the federal government to crowd out religious alternatives from all social welfare fields the government chooses to assist.

Our position in this case is straightforward: *per se* exclusion of an otherwise eligible organization from participation in a government program, merely because of its religious affiliation or identity, would violate the Free Exercise and Equal Protection Clauses of the Constitution. *Widmar v. Vincent*, 454 U.S. 263 (1981); *McDaniel v. Paty*, 435 U.S. 618, 626 (1978); *Sherbert v. Verner*, 374 U.S. 398 (1963); *Everson v. Board of Education*, 330 U.S. 1, 16 (1947). A categorical exclusion of religiously-affiliated groups is inimical to the vision of religious pluralism reflected by the First Amendment, and stands on its head the Establishment Clause's central principle of neutrality.

Neither, of course, may religious organizations be *preferred* in government social welfare spending programs. The primary question in cases like this one is whether the method of selection of private grant recipients and the enforcement of grant conditions is constitutionally *neutral* with respect to religion. The key factor under this Court's cases is that "the benefit of government programs and policies [must be] generally avail-

able, on the basis of some secular criterion, to a wide class of similarly situated nonreligious beneficiaries." *Marsh v. Chambers*, 463 U.S. 783, 809 (1983) (Brennan, J., dissenting). See also *Roemer v. Board of Public Works*, 426 U.S. 736, 746 (1976) (plurality opinion per Blackmun, J.) ("religious institutions need not be quarantined from public benefits that are neutrally available to all").

This is not to say that religious organizations may divert government funds to sectarian uses. On the contrary, if any grantee diverts AFLA funds to its own purposes in violation of the terms of the grant, including using those funds to teach or promote religion, the grantee should be required to return the misspent funds and, in appropriate cases, should be excluded from further participation in the program. If the grantee complies with the terms of the program and uses AFLA funds solely in furtherance of the statutory objectives, however, it should be allowed to participate without discrimination or distinction based on religious belief, affiliation, or inspiration. We do not ask for special preference for religious organizations; we ask only that government be neutral toward religion.

The three-part test of *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971), embodies this requirement of neutrality, and fully supports the constitutionality of the AFLA. Our argument is organized around this Court's application of the *Lemon* test to three different categories of cases. The first consists of cases in which government programs distribute funds in a genuinely and reliably neutral manner. The second consists of programs where there is greater danger that the funding may favor religion, but where constitutional neutrality can be achieved through restrictions on the religious use of funds. The third consists of cases in which aid is targeted to pervasively sectarian organizations. We will demonstrate that the AFLA is constitutional under any of the approaches taken by this Court. The AFLA is entirely neutral in its distribution of funds, and the district court

judgment should be reversed on that ground alone. Alternatively, the court should be reversed for excluding all religiously affiliated organizations from participation in all parts of the AFLA program, in the absence of necessary findings that grantees have used AFLA funds for specifically religious purposes, that AFLA grantees are pervasively sectarian, and that all AFLA-funded services are susceptible to religious use.

ARGUMENT

THE ESTABLISHMENT CLAUSE PERMITS THE INVOLVEMENT OF RELIGIOUSLY-AFFILIATED ORGANIZATIONS, ALONG WITH OTHER PRIVATE VOLUNTARY AND CHARITABLE ASSOCIATIONS, IN GOVERNMENT-SUPPORTED SOCIAL WELFARE PROGRAMS, INCLUDING THE AFLA

A. Neutrality Is The Dominant Consideration In Evaluating the Constitutionality of Social Welfare Programs Involving Religiously Affiliated Organizations

In the context of publicly-supported, privately-administered social welfare programs, as elsewhere, the Establishment and Free Exercise Clauses work together to guarantee religious neutrality, pluralism, and choice. The Establishment Clause precludes using government resources to favor religion, and the Free Exercise Clause (along with related conceptions of Equal Protection) precludes discrimination against religion or religious organizations. Government must not "interject any religious activity into a nonreligious context." *Walz v. Tax Commission*, 397 U.S. 664, 689 (1970) (Brennan, J., concurring). Nor may the Establishment Clause "be used as a sword to justify repression of religion or its adherents from any aspect of public life." *McDaniel v. Paty*, 435 U.S. 618, 641 (1978) (Brennan, J., concurring).

The unifying theme of this Court's Religion Clause jurisprudence is the principle of neutrality. As the Court stated in *Roemer v. Board of Public Works*, 426 U.S. 736, 747 (1976), "Neutrality is what is required. The State must confine itself to secular objectives, and neither

advance nor impede religious activity." See also *Grand Rapids School District v. Ball*, 473 U.S. 373, 382 (1985) ("the government [must] maintain a course of neutrality among religions, and between religion and nonreligion"); *Everson v. Board of Education*, 330 U.S. 1, 18 (1947) (the First Amendment "requires the state to be neutral in its relations with groups of religious believers and nonbelievers; it does not require the state to be their adversary.")

If a government program neither favors nor disfavors religion or religious organizations, as compared to other organizations or systems of thought or belief, the purposes of the Religion Clauses are protected in three ways. First, the neutrality shows that the legislative *purpose* has no specific reference to religion; religion is affected only as part of a larger secular scheme. The principle of neutrality thus "require[s] that the legislature manifest a secular purpose and omit all sectarian endorsements from its laws." *Wallace v. Jaffree*, 472 U.S. 38, 75 (1985) (O'Connor, J., concurring). Second, neutrality guarantees that the *effect* of the program is "one that neither advances nor inhibits religion." *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971). To favor religious organizations would advance religion; to disfavor religious organizations would inhibit religion; to act neutrally protects pluralism and religious choice. Third, neutrality ensures that the government program will not be perceived as an *endorsement* of religion. *Witters v. Department of Services*, 106 S. Ct. 748, 753 (1986); *Widmar v. Vincent*, 454 U.S. 263, 274 (1981). If government neither favors nor disfavors religion, objective observors will be able to see that "adherence to religion [is not] relevant to a person's standing in the political community." *Wallace v. Jaffree*, 472 U.S. at 69 (O'Connor, J., concurring); *Lynch v. Donnelly*, 465 U.S. 668, 692 (1984) (O'Connor, J, concurring).

To exclude a private organization from participation in public benefits solely because of religious affiliation or inspiration violates the Free Exercise Clause by imposing

a penalty for religious affiliation. "[G]overnment may not use religion as a basis of classification for the imposition of duties, penalties, privileges, or benefits. 'State power is no more to be used so as to handicap religions than it is to favor them.'" *McDaniel v. Paty*, 435 U.S. 618, 639 (Brennan, J., concurring) (quoting *Everson v. Board of Education*, 330 U.S. 1, 18 (1947)) (footnote omitted). See also *Widmar v. Vincent*, 454 U.S. 263 (1981); *Sherbert v. Verner*, 374 U.S. 398 (1963); *Niemotko v. Maryland*, 340 U.S. 268 (1951). The animating values of the Religion Clauses are diversity, pluralism, and choice (*Walz v. Tax Commission*, 397 U.S. 664, 689 (1970) (Brennan, J., concurring))—all best achieved through a policy of neutrality rather than one of rigid separation.

B. Long-standing History and Precedent Support the Participation of Religious Organizations in Publicly Supported Social Welfare Programs on an Equal Footing With Other Private Groups

The difficulty in faithfully applying the purposes of the First Amendment in this case arises from the substantially changed nature of government in the past two hundred years. The central problem now is how to apply the broadly-stated proscriptions of the First Amendment in specific cases arising many years later and involving unanticipated circumstances, remaining faithful to the intentions of the Framers, but without engaging in anachronistic or reductionist reasoning. See *West Virginia Board of Education v. Barnette*, 319 U.S. 624, 639 (1943).[5]

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[5] To the extent that parallels can be drawn to specific historical practices, these suggest an understanding of church-state separation that emphasizes the freedom of religious institutions from government control and a refusal to support specifically sectarian teaching—not a divorcement of religious institutions from charitable functions. See *Terrett v. Taylor*, 13 U.S. (9 Cranch) 43, 48-49 (1815) (Story, J.). Where religious institutions were well-suited to advance governmental purposes (as, for example, in training the Indian tribes in "the arts of civilized life"), even such ardent "separationists" as Thomas Jefferson did not hesitate to sup-

Eighteenth-century America closely resembled the Lockean vision of distinct, separate "jurisdiction" for the respective authority of church and state;[6] but what was thought properly within the realm of each differs drastically from the way those roles are commonly viewed today. The *church* was the proper organ of social welfare, charity, and refuge; "separation of church and state" was a jurisdictional notion that required that government neither support nor interfere with these functions of religion. For the Framers, the concepts of "separation" and "neutrality" were effectively synonymous: government neutrality with respect to religion meant leaving religion alone, its areas of activity untouched and unchallenged by state power.

Since 1791, and especially in the twentieth century, the scope of governmental activity has broadened to encompass areas formerly left to the private sphere—notably education and social welfare. See *Thomas v. Review Board*, 450 U.S. 707, 721-22 (1981) (Rehnquist, J., dissenting). But this does not—and we submit *cannot*—mean that as government expands, the scope of religious life must be forced to contract. Any expansion of the scope of government should be achieved in a way that allows space for religion, so that the people can continue to exercise religious choice even in areas of life in which the government has become involved. *Bowen v. Roy*, 106 S. Ct. 2147, 2169 (1986) (O'Connor, J., dissenting).

With the expansion of governmental power generally, this Court has recognized that a rigid "separation" of

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port them. See, for example, 7 Stat. 78 (1846) (Jefferson's treaty with the Kaskaskia Indians, proclaimed Dec. 23, 1803).

[6] See Locke, *A Letter Concerning Toleration*, in P. Kurland & R. Lerner, 5 The Founders' Constitution 52 (1987); *Abington School Dist. v. Schempp*, 374 U.S. 203, 231 (1963) (Brennan, J., concurring); Sandler, *Lockean Ideas in Jefferson's Bill for Establishing Religious Freedom*, 21 J. of the Hist. of Ideas 110 (1960); Madison, *Memorial and Remonstrance Against Religious Assessments*, reprinted at 330 U.S. 63 (1947).

church and state will not always serve the central objectives of neutrality and religious choice. This Court has recognized that some level of interaction between church and state is inevitable and necessary. *Lynch v. Donnelly*, 465 U.S. 668, 672-74 (1984); *Roemer v. Board of Public Works*, 426 U.S. 736, 745-46 (1976) (plurality opinion per Blackmun, J.). Preservation of religious freedom under conditions of the modern welfare state requires a shift in emphasis from "strict separation"—meaning a homogeneously secular public sphere—to neutrality, a "benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference." *Walz v. Tax Commission*, 397 U.S. 664, 673 (1970). See Giannella, *Religious Liberty, Nonestablishment, and Doctrinal Development: Part II. The Nonestablishment Principle*, 81 Harv. L. Rev. 513, 522 (1968).

Accordingly, this Court has never held that religious organizations must be excluded from publicly-supported social welfare programs. On the contrary, in the case most directly on point, *Bradfield v. Roberts*, 175 U.S. 291 (1899), this Court upheld a grant of $30,000 by Congress to a hospital, even though the hospital was "conducted under the auspices of the Roman Catholic Church," which "exercise[d] great and perhaps controlling influence over the management of the hospital." *Id.* at 298. The decisive question for the Court was whether the hospital would fulfill the secular purposes of the statute; the mere fact of Providence Hospital's religious affiliation was "wholly immaterial." *Id.* at 299.

More recently, Justice Blackmun, writing for a plurality in *Roemer v. Board of Public Works*, 426 U.S. 736 (1976), stated the point succinctly. "It has long been established," he wrote, "that the State may send a cleric, indeed, even a clerical order, to perform a wholly secular task." *Id.* at 746. "[R]eligious institutions need not be quarantined from public benefits that are *neutrally available to all*." *Ibid.* (emphasis added).

This means that religious organizations may, and do, participate as grantees in a wide variety of publicly funded programs.[7] Indeed, grants to private organizations have become a favored instrument for furthering governmental social welfare objectives.[8] As the Senate Labor and Human Resources Committee stated in reauthorizing the AFLA: "Charitable organizations with religious affiliations historically have provided social services with the support of their communities and without controversy." S. Rep. No. 98-496, 98th Cong., 2d Sess. 10 (1984).

The interaction of governmental and religious agencies in many areas of social welfare is so important that it is difficult to imagine how public purposes could

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[7] *See generally* B. Coughlin, Church and State in Social Welfare (1965); Giannella, *supra* 81 Harv. L. Rev. at 554-560; McConnell, *Political and Religious Disestablishment*, 1986 B.Y.U. L. Rev. 405, 420-24; Pickrell & Horwich, *"Religion as an Engine of Civil Policy": A Comment on the First Amendment Limitations on the Church-State Partnership in the Social Welfare Field*, 44 Law & Contemp. Prob. 111, 113 n.16 (1981). Among the federal programs cited by these authors and in other sources are: 7 U.S.C. 1722 (international famine relief); 29 U.S.C. 771(b)(1) (1982) (rehabilitation for the handicapped); Hill-Burton Act of 1946, 42 U.S.C. 291 (1982) (hospital construction); 42 U.S.C. 620 (1982) (state child welfare services); 42 U.S.C. 632(c) (1982) (Work Incentive Program); 42 U.S.C. 1397a (1982) (Social Services Block Grant); 42 U.S.C. 2931-2932 (1982) (day care); 42 U.S.C. 3027(a)(14) (multi-purpose senior centers). Many more programs at the state and local level involve religious organizations. 42 U.S.C. 9805 (community development), P.L. No. 100-77, 101 Stat. 482, § 412, to be codified at 42 U.S.C. 11372 (Stewart B. McKinney Homeless Assistance Act).

[8] See American Jewish Congress, Report of Task Force on Public Funding of Jewish Social Welfare Institutions 10 (1986) ("In the past several decades, government has taken increasing responsibility for fulfilling the health and welfare needs of its citizens, and has done so *not* through the creation of government agencies but through the direct funding of private institutions or the provision of individual entitlements."); Pickrell & Horwich *supra* at 111, 112-14 (1981).

be achieved without it. Emergency shelters and feeding programs, for example, rely heavily on the availability of church and synagogue facilities and religious volunteers, with the government supplying all or part of the operating costs of food, blankets, and the like. See, *e.g.*, Simpson, "Salvation Army's Job Is Growing Tougher As Cries for Help Arise," Wall St. J. at sec. 1, p. 1 (Dec. 21, 1987). Outreach programs to undocumented workers to explain the features of the new immigration law depend on churches to mediate between an apprehensive populace and the government's enforcement bureaucracy. See P.L. 99-603, 100 Stat. 3359 (1986). Religious orphanages and adoption services are necessary to ensure that the free exercise rights of parents and children are accommodated. See *Wilder v. Sugarman*, 385 F.Supp. 1013 (S.D.N.Y. 1974) (three judge court) (rejection of racial challenge), *modified sub nom. Wilder v. Bernstein*, 645 F.Supp. 1292, 1329-39 (1986) (settlement of as-applied challenge).

An American Jewish Congress task force describes the role of one not atypical religious group in government-supported social welfare activity:

> The American Jewish community has historically devoted considerable effort to the founding and maintenance of various community welfare agencies: hospitals, nursing homes, child care agencies, day-care centers, community centers, and employment and guidance agencies. Along with traditional welfare services, some of these institutions provide the Jewish community with programs not offered in other such agencies; for example, kosher food, observance of Jewish holidays, [and] Jewish chaplains. . . . [B]y creating a distinctive Jewish ambiance in which social services are offered, these sectarian welfare agencies not only make it more likely that their service will reach and be used by all community members who need them, but also advance the organized Jewish community's stake in Jewish continuity.

American Jewish Congress, Report of Task Force on Public Funding of Jewish Social Welfare Institutions 1 (1986). This report ably describes the combination of secular service and religious accommodation that religious social welfare agencies can provide. But the report warns: "The pressing demands in recent years for social services, together with sharp increases in costs, have rendered sectarian welfare institutions unable to fulfill their increasingly expensive missions without considerable infusions of public money." *Ibid.*

Disregarding the long-standing practice of involving religious organizations along with other voluntary and charitable associations in public welfare functions, the district court held that religious organizations must be barred from publicly funded programs if those programs relate to their "religious mission" (U.S. J.S. App. 30a). The effect of this approach is to favor nonreligious organizations over religious, to create incentives for religiously affiliated organizations to drop their affiliations, and to deny beneficiaries the option of receiving the services from providers sensitive to their religious needs.

The district court obliquely acknowledged the legitimacy of religious participation in social welfare programs in a footnote (U.S. J.S. App. 22a n.12), but purported to distinguish the AFLA on the ground that it is "related to religious doctrine" (*id.* at 27a). See *id.* at 30a:

> It is a fundamental tenet of many religions that premarital sex and abortion are wrong, even sinful. . . . The AFLA does not prohibit these religions from receiving AFLA grants. Thus, by contemplating the provision of aid to organizations affiliated with these religions—aid for the purpose of encouraging abstinence and adoption—the AFLA contemplates subsidizing a fundamental religious mission of those organizations.

This argument proves too much. Virtually every activity conducted by religious organizations is related to their

"religious mission" and grows out of a commitment to their "religious doctrine." There is nothing uniquely "religious" about issues of sex and pregnancy; the Bible talks as often about caring for the poor, the widow, the orphan, and the alien as it does about sex.[9] Religious organizations should not be barred from programs to feed and house the poor merely because these advance religious objectives at the same time that they achieve the government's secular purposes. The district court's "religious mission" standard is tantamount to excluding all religious organizations from social welfare programs and effectively overrules *Bradfield v. Roberts*.

C. Inclusion of Religious Organizations in the AFLA Does Not Violate the Three-Part *Lemon* Test for an Establishment of Religion

Under this Court's precedents in the social welfare field, a government program in which financial assistance is provided to private organizations, including religious organizations, is permissible under the Establishment Clause if it satisfies three criteria. First, the program must have a legitimate, nonpretextual secular governmental purpose. Second, the distribution of funds must neither favor nor disfavor religion or religious organizations, as compared to their secular counterparts. Third, any prohibitions on religious use must be no more

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[9] See Pickrell & Horwich, *supra*, 44 Law & Contemp. P. at 112 ("The care of the indigent, the neglected, and the sick by religious organizations derives from a fundamental theological commitment to charity and "good works.") Again, the American Jewish Congress report is instructive. As it points out, hospitals, nursing homes, child care agencies, and the like perform secular functions, and aid to such services is presumably constitutional under current law. But these services are provided, in part, to "advance the organized Jewish community's stake in Jewish continuity" and to do so in a "distinctive Jewish ambiance" with provision for Jewish religious observance. American Jewish Congress, *supra*, at 1. It is not possible to draw strict lines between the sacred and the secular; what is secular from the perspective of government and law is not infrequently infused with religious significance from the perspective of the believer.

intrusive ("entangling") than is essential to serve the government's interest in ensuring that funds are devoted to the secular objective. See *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971). The AFLA satisfies each of these criteria.

This Court's precedents applying the *Lemon* test to programs of financial aid to religious organizations fall into three categories. First are cases in which the distribution of funds (or the conferring of any general benefit) is entirely neutral between religious and nonreligious participants in the program. In these cases, the program is upheld without any further restriction of the uses to which the public funds are put, and consequently without serious danger of excessive entanglement. See, *e.g., Witters v. Department of Services*, 106 S. Ct. 748 (1986); *Mueller v. Allen*, 463 U.S. 388 (1983); *Widmar v. Vincent*, 454 U.S. 263 (1981); *Walz v. Tax Commission*, 397 U.S. 664 (1970); *Bradfield v. Roberts*, 175 U.S. 291 (1899).

In the second category are cases in which the Court examines the character of the institutions and the uses of the funds, invalidating any grants that are used for "specifically religious purposes" or that go to institutions so "pervasively sectarian" that religious and nonreligious uses cannot be distinguished. See, *e.g., Roemer v. Board of Public Works*, 426 U.S. 736 (1976); *Hunt v. McNair*, 413 U.S. 734, 743 (1973); *Tilton v. Richardson*, 403 U.S. 672 (1971).

The third category is made up of cases in which the aid recipients are found, on the basis of specific evidence and factual findings, to be "pervasively sectarian." All of these cases have involved parochial elementary and secondary schools. In these cases, pervasively sectarian organizations are prohibited from receiving any benefit that might be used or diverted for religious purposes, such as physical facilities, salary supplements, instructional equipment, maintenance grants, and on-site remedial services. The Court has reasoned that even if these

resources are not actually used for religious training and indoctrination, the monitoring needed to police these restrictions would entail "excessive entanglement" between church and state. See, *e.g., Aguilar v. Felton*, 473 U.S. 402 (1985); *Grand Rapids School District v. Ball*, 473 U.S. 373 (1985); *Wolman v. Walter*, 433 U.S. 229 (1977); *Committee for Public Education v. Nyquist*, 413 U.S. 756 (1973); *Lemon v. Kurtzman*, 403 U.S. 602 (1971). Even pervasively sectarian organizations, however, are permitted to receive so-called "self-policing" or "nonideological" forms of aid, such as transportation, school lunches, secular textbooks, off-site counseling and remedial services, standardized tests, and recordkeeping. *Committee for Public Education v. Regan*, 444 U.S. 646 (1980); *Wolman, supra*; *Lemon v. Kurtzman*, 403 U.S. at 616; *Board of Education v. Allen*, 392 U.S. 236 (1968); *Everson, supra.*

The distinction between the first and the second categories has not been fully articulated. However, all cases in the first category involve a form of aid in which the distribution of funds is genuinely and reliably neutral between religious and nonreligious beneficiaries. Many of these cases involve government assistance to individuals who choose whether to use the aid in a religious or a nonreligious environment; but some of these cases involve direct grants to service providers on the basis of objective criteria. Cases in the second category, by contrast, generally involve forms of aid that either on the face of the program or in actual operation are, or could be, skewed in favor of religious beneficiaries. The third category, logically a subset of the second, involves schemes in which the vast preponderance of aid is targeted to pervasively sectarian institutions. *Nyquist*, 413 U.S. at 785. The general principle uniting these three categories of cases is that a program is constitutional if it is genuinely and reliably neutral in its distribution of funds; otherwise, the uses of funds must be scrutinized to ensure that the effect is not to subsidize religious activity.

We contend that the judgment below must be reversed under any of the approaches used by this Court. Both the terms of the statute and the actual manner of administration require that AFLA grants are made neutrally; and grantees have been prohibited from using AFLA funds to teach or promote religion. There has been no finding that any AFLA grantee is pervasively sectarian, let alone that the preponderance of aid is targeted to pervasively sectarian organizations. Under any of the Court's approaches, therefore, the AFLA should be sustained.

1. ***Under this Court's "Neutral Funding" Precedents, the AFLA Should Be Upheld on the Ground that Grants Are Made to a Wide Array of Religious and Nonreligious Organizations Under Genuinely Neutral Criteria***

a. *Purpose.*

The district court concluded from "the indisputable language of the AFLA" that its purpose was to "solve the problems caused by teenage pregnancy and premarital sexual relations." U.S. J.S. App. 19a. The program "promotes adoption, establishes innovative, comprehensive and integrated care services for pregnant adolescents, and supports research and demonstration projects concerning the causes and consequences of adolescent premarital relations." *Ibid.* There is no doubt that these matters are sensitive and value-laden, but as the district court held, they are not distinctively religious.

Much of plaintiffs-appellees' argument depends on labeling as "religious" certain beliefs and attitudes about ethics and human sexuality, despite the fact that these beliefs and attitudes can be, and are, shared by persons of many different religious persuasions or no religion at all. The view that sexual self discipline is an appropriate approach to adolescent training about sexuality, that adoption should be considered as an alternative to abortion, and that teenage pregnancy should be discouraged is not unique to religious persons. A position on

issues of human ethics does not become "religious" merely because it is consistent with the tenets of some religions.

This case is similar to *Harris v. McRae*, 448 U.S. 297 (1980), in which the appellees contended that a government program to encourage childbirth by paying the medical costs of childbirth and not those of abortion was unconstitutional because it "incorporate[d] into law the doctrines of the Roman Catholic Church." *Id.* at 319. The Court rejected this argument, observing that the program "is as much a reflection of 'traditionalist' values toward abortion, as it is an embodiment of the views of any particular religion." *Ibid.*

> [A] statute does not violate the Establishment Clause because 'it happens to coincide or harmonize with the tenets of some or all religions.' *McGowan v. Maryland*, 366 U.S. 420, 442 [1961]. That the Judaeo-Christian religions oppose stealing does not mean that a State or the Federal Government may not, consistent with the Establishment Clause, enact laws prohibiting larceny.

Ibid.

Similarly, the purposes of the AFLA are as much a reflection of "traditionalist" as of "religious" values. That the purposes of the AFLA coincide with the teachings of some religions is no reason to conclude that they are impermissible under the First Amendment.[10] Accordingly, as the district court concluded, the care and prevention projects funded by the AFLA are secular services enacted for secular purposes. From the perspec-

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[10] If it were true that teaching sexual self-discipline commits the government to a position on a "religious" issue, it would be equally true that teaching artificial contraception or "safe sex" implicates the same "religious" issue. Yet plaintiffs-appellees' position appears to be that viewpoints consistent with their beliefs are "secular" while conflicting viewpoints are "religious." Only their viewpoint may be subsidized by the government. That is not neutrality.

tive of the Establishment Clause, the fact that they coincide with some religious beliefs is immaterial.

b. *Effect.*

When government provides public services or addresses public problems, it is not required to exclude religious organizations from the benefit. Churches, no less than other institutions in the community, are entitled to receive police and fire protection, to use the mails and the roads, and to have access to courts of justice. *Everson v. Board of Education*, 330 U.S. 1, 16 (1947). To cut religious organizations off from benefits otherwise available to all would constitute hostility toward religion and would in effect impose a penalty on the basis of belief in violation of the Free Exercise Clause. It is fully in keeping with the First Amendment for the government to "facilitate the existence of a broad range of private, non-profit organizations, among them religious groups." *Walz*, 397 U.S. at 689 (Brennan, J., concurring).

Neutrality is the key. While government may not provide benefits for the purpose of promoting religion, it need not withhold benefits merely because there will be a benefit to religion. Rather, any benefit to religion is permissible if it is strictly "incidental"[14] to the overall sweep of the program; the test is whether the benefit would be extended even if the beneficiary were not religious.[12]

This Court has applied this neutrality test in many cases, involving a wide variety of social programs. We have already discussed *Bradfield v. Roberts*, 175 U.S. 291, 299 (1899), in which the Court declared "wholly

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[11] *Roemer*, 426 U.S. at 747; *Committee for Public Education v. Nyquist*, 413 U.S. 756, 771 (1973); *Sloan v. Lemon*, 413 U.S. 825, 832 (1973).

[12] An exception to this principle is that a religion-specific accommodation may be permissible if needed to protect religious freedom. See *Corporation of Presiding Bishop v. Amos*, 107 S. Ct. 2862, 2867 (1987).

immaterial" the religious affiliation of a hospital that received federal funds. Since the purpose of the government aid was to provide health care and there was no suggestion that the particular hospital was chosen because of its religious affiliation, there was no reason to treat the hospital any differently than any other grantee under the program.

In *Witters v. Department of Services*, 106 S. Ct. 748 (1986), a unanimous Court held that public funds could be used to pay the tuition of a student at the Inland Empire School for Bible, an intensely religious institution at which he chose to study for the ministry. Notwithstanding the ultimate religious use of the funds, the Court upheld the program because the funds were distributed neutrally to a defined class of eligible individuals for vocational training.

Justice Marshall's opinion for the Court stated that the neutrality of the funding scheme was "central to our inquiry." 106 S. Ct. at 752. The "program is 'made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefitted,' and is in no way skewed toward religion." *Ibid.* (citation omitted). The Court explained that the program "does not tend to provide greater or broader benefits for recipients who apply their aid to religious education, nor are the full benefits of the program limited, in large part or in whole, to students at sectarian institutions." *Ibid.* Justice Powell, joined in substantial part by four other Justices, expressed the controlling principle as follows: "state programs that are wholly neutral in offering educational assistance to a class defined without reference to religion do not violate the second part of the *Lemon* v. *Kurtzman* test." *Id.* at 754 (concurring opinion); accord, *id.* at 753 (White, J., concurring); *id.* at 755 (O'Connor, J., concurring).

Because the funding formula in *Witters* was entirely neutral between religious and nonreligious beneficiaries, the Court inquired no further into the uses to which the

publicly-funded tuition money would be put. Indeed, the record showed that the tuition would go toward such obviously religious uses as training in "bible" and in "church administration." 106 S. Ct. at 750. Neutrality was achieved through even-handed distribution of public resources, not through an insistence that every participating institution secularize itself. The constitutional objective of religious pluralism is frustrated if, as a condition to participating in otherwise neutrally available benefits, a religious organization is forced to purge itself of its religious character.[13]

In *Witters*, the neutrality of the funding formula was guaranteed because the decision whether to use the tuition grant in a religious or a nonreligious institution was made by the individual student rather than the government. "Any aid . . . that ultimately flows to religious institutions does so only as a result of the genuinely independent and private choices of aid recipients." 106 S. Ct. at 752. But as the Court made clear, the form of the transaction is not decisive. Some forms of aid may have the effect of a subsidy to religion "even though it takes the form of aid to students or parents." *Ibid.* (citing *Grand Rapids School District*, 473 U.S. at 394); accord, *Committee for Public Education v. Nyquist*, 413 U.S. 756, 781 (1973); *Grove City College v. Bell*, 465 U.S. 555, 564-65 (1984). The decisive point is not how the aid is distributed as a formal matter, but whether the distribution of funds is genuinely neutral.

Witters is the most recent of a long line of cases in which aid distributed neutrally to religious and nonreligious organizations alike has been sustained without

[13] This is not to say that the government is forbidden to require that a grantee does not divert public funds from statutory to religious purposes, as the Secretary has done in the AFLA program. But for the government to go the additional step of requiring the organization to alter its own character or affiliation, or secularize the ways it uses its own funds, would defeat the pluralistic purposes of the First Amendment. Cf. *FCC v. League of Women Voters*, 468 U.S. 364, 399-401 (1984).

examination into whether the uses to which the aid is put are religious. In *Mueller v. Allen*, 463 U.S. 388 (1983), the Court upheld a Minnesota program of tax deductions for parents' expenses incurred in obtaining education for the children. The large part of these expenses were tuition payments to private schools, most of which were religious schools. *Id.* at 400-01. As in *Witters*, the decisive consideration was the neutrality of the funding formula. "Most importantly, the deduction is available for educational expenses incurred by *all* parents, including those whose children attend public schools and those whose children attend nonsectarian private schools or sectarian schools." *Id.* at 397 (emphasis in original). The program therefore was consistent with the Establishment Clause, notwithstanding the fact that tuition to parochial schools undoubtedly paid for religious instruction.[14]

In *Widmar v. Vincent*, 454 U.S. 263, 270-75 (1981), the Court held that it would not violate the Establishment Clause for a state university to make its facilities available, without payment, to a religious group on an equal

[14] Unlike *Witters*, which was unanimous, the Court was closely divided in *Mueller*. The disagreement, however, turned on whether the funding formula in *Mueller* was genuinely neutral, not on whether a genuinely neutral program would be constitutional. Thus, Justice Marshall's dissenting opinion stressed that the "vast majority of the taxpayers who are eligible to receive the benefit are parents whose children attend religious schools." 463 U.S. at 405. The majority, by contrast, was "loath" to allow the constitutionality of the program to depend on evidence regarding the actual incidence of the benefit. It preferred to base the decision on the facial neutrality of the statute. *Id.* at 401. A similar methodological disagreement divided the otherwise unanimous Court in *Witters*. Compare 106 S. Ct. at 752 (opinion for the Court by Marshall, J.), *with id.* at 754 n.3 (Powell, J., concurring). For purposes of this case, the question dividing the Court in *Mueller* and *Witters* is immaterial. As discussed more fully below, the AFLA's funding formula is neutral on its face, and in practice fewer than 25% of the grantees have been religiously affiliated. Under either methodology, the AFLA is genuinely neutral between religious and nonreligious participants.

basis with other university student groups. Free facilities are, of course, a valuable benefit; and the group intended to use this benefit for core religious purposes, including religious teaching, worship, and prayer. The Court reasoned, however, that when benefits of this sort are open to all on a neutral basis, there is no effect of "advanc[ing] religion." *Id.* at 273. "The provision of benefits to so broad a spectrum of groups is an important index of secular effect." *Id.* at 274.

In *Committee for Public Education v. Nyquist*, 413 U.S. 756 (1973), the Court sharply differentiated between programs in which aid flows to "*all* schoolchildren" (*id.* at 782 n.38 (emphasis in original)) and those in which aid is restricted to those who choose to attend private schools, which are overwhelmingly sectarian. The Court suggested, in dictum, that it would approve of a genuinely neutral aid program like the "G.I. Bill." *Ibid.* This dictum became holding in two summary affirmances: *Americans United for Separation of Church and State v. Blanton*, 433 F. Supp. 97 (M.D. Tenn.), *aff'd*, 434 U.S. 803 (1977); *Smith v Board of Governors*, 429 F. Supp. 871 (W.D.N.C.), *aff'd*, 434 U.S. 803 (1977).

In *Walz v. Tax Commission*, 397 U.S. 664 (1970), the Court held, with only one dissent, that state property tax exemptions for religious organizations are permissible, even when the property is used "solely for religious worship." *Id.* at 666. Emphasizing the constitutional principle of "neutrality" (*id.* at 669), the Court noted that the tax benefit was provided to churches "within a broad class of property owned by nonprofit, quasi-public corporations which include hospitals, libraries, playgrounds, scientific, professional, historical, and patriotic groups." *Id.* at 673. As Justice Brennan stated in concurrence: "Government may properly include religious institutions among the variety of private, nonprofit groups that receive tax exemptions, for each group contributes to the diversity of association, viewpoint, and enterprise essential to a vigorous, pluralistic society." *Id.* at 689.

In sum, the key factor under this Court's cases is that "the benefit of government programs and policies [must be] generally available, on the basis of some secular criterion, to a wide class of similarly situated nonreligious beneficiaries." *Marsh v. Chambers*, 463 U.S. 783, 809 (1983) (Brennan, J., dissenting). If a government program is genuinely neutral—if it distributes its benefits neutrally to religious and nonreligious organizations alike—then it satisfies the second criterion of the *Lemon* test, without further need for inquiry into how the funds are spent.

The AFLA is constitutional on this ground. Congressional policy, reflected in the AFLA as well as countless other statutes, holds that grantees should be representative of the broad spectrum of private associations in the field. In enacting the AFLA, Congress expressly found that issues of adolescent sexuality and pregnancy are "best approached through a variety of integrated and essential services provided . . . by other family members, religious and charitable organizations, voluntary associations, and other groups in the private sector as well as services provided by publicly sponsored initiatives." 42 U.S.C. 300z(a)(8)(B).

Religious organizations are neither favored nor disfavored by the AFLA; they are merely included among the wide array of private and governmental organizations that may be involved in the program. As the Senate Report states: "Religious affiliation is not a criterion for selection as a grantee under the adolescent family life program, but any such grants made by the Secretary would be a simple recognition that nonprofit religious organizations have a role to play in the provision of services to adolescents." S. Rep. 97-161, at 15-16.

In four places in the statute, the AFLA refers to religious organizations; in all four the reference is to a variety of community organizations ("religious and charitable organizations, voluntary associations, and other groups in the private sector as well as services sponsored

by publicly sponsored initiatives"). 42 U.S.C. §§ 300z(a)(8)(B), (10)(c), 300z-5(a)(21); see *id.*, § 300z-1(a)(3) ("'eligible grant recipient' means a public or nonprofit private organization or agency"). The AFLA "encourages" the involvement of the family and the community, and names "religious organizations" as only one of several community resources that might be used. "The very breadth of this scheme . . . negates any suggestion that [Congress] . . . intends to single out religious organizations for special preference." *Walz*, 397 U.S. at 689 (Brennan, J., concurring).[15]

The changes Congress made in the old Title VI program when enacting the AFLA do not indicate any intention to favor religion. As the district court noted, "Title VI was amended not only to add religious organizations to the list of entities that may participate in AFLA programs, but also to add families, charitable organizations, voluntary associations and other groups." U.S. J.S. App. 21a. Moreover, even under Title VI, religious organizations were eligible to participate, and did participate, in the program. S. Rep. 97-161, *supra*, at 16.

The record shows that government officials charged with selecting grantees did so without regard to religious affiliation. J.A. 781-83. Grant applicants were ranked according to objective, secular criteria bearing on their probable effectiveness in accomplishing the statutory purposes. The record shows that fewer than 25% of the grantees in the AFLA program have been religiously affiliated. J.A. 748-56. This demonstrates that administration of the program "is in no way skewed towards religion." *Witters*, 106 S. Ct. at 752.

[15] Section 300z-5(a)(21) states that applications for AFLA grants "shall include" a "description of how the applicant will, as appropriate in the provision of services . . . involve religious and charitable organizations, voluntary associations, and other groups in the private sector as well as services sponsored by publicly sponsored initiatives." This section does not require the participation or funding of religious organizations in each and every grant. Rather, it suggests that grantees should seek to involve community groups and that religious organizations are among them.

That the AFLA involves direct grants to religiously affiliated organizations rather than grants to individual beneficiaries, as in *Witters* and *Mueller*, is not decisive. To be sure, when aid flows to religious institutions "only as a result of the genuinely independent and private choices of aid recipients" (*Witters*, 106 S. Ct. at 752), this is an excellent proxy for neutrality. As this Court has frequently observed, however, the "economic effect of direct and indirect assistance often is indistinguishable." *Grove City College v. Bell*, 465 U.S. 555, 565 (1984); see *Witters*, 106 S. Ct. at 752; *Grand Rapids*, 473 U.S. at 394; *Mueller*, 463 U.S. at 397 n.6; *Nyquist*, 413 U.S. at 783; *Norwood v. Harrison*, 413 U.S. 455, 463-65 (1973). Thus, "indirect assistance" has been held unconstitutional when it is not genuinely neutral. *Sloan v. Lemon*, 413 U.S. 825 (1973); *Nyquist*, 413 U.S. at 780-94. More importantly for present purposes, direct grants to religiously affiliated institutions were upheld without scrutiny into use in *Bradfield v. Roberts*, 175 U.S. 291 (1899). *Bradfield* has been the governing precedent for judicial evaluation of aid to social welfare programs outside the field of education for almost a century. To require particularized scrutiny of the uses of public money in the social welfare field, with all the "entanglement" that entails,[16] would seriously disrupt a settled and essentially noncontroversial area of constitutional law.

By including religious as well as nonreligious participants, Congress both procures the services of the best qualified grant applicants, without regard to religion, and gives families a broader range of choice in the style and philosophy of service agencies. Congress found, for example, that projects for the benefit of "hispanic and other minority populations are more accepted by the population if they include sectarian, as well as nonsectarian organizations in the delivery of those services." S. Rep.

[16] See pages 30-32, 43-44, *infra*.

98-496, *supra*, at 10. As with other social welfare activities, religious organizations are in a position to make a valuable contribution toward the purposes of the AFLA. Indeed, before the AFLA was enacted, religious as well as other voluntary and charitable groups were providing homes for unwed mothers, adoption services, maternity health clinics, and programs for family involvement in adolescent sexual awareness. See 42 U.S.C. 300z-4(a)(4). There is no reason why government entry into the field should have to *reduce* the diversity of service providers.

c. *Entanglement.*

This Court has held that a program of financial assistance to religious organizations can be unconstitutional, even when it is secular in purpose and neutral in effect, if it entails an "excessive entanglement" between religious and governmental authorities. *Lemon*, 403 U.S. at 613; see *Aguilar v. Felton*, 473 U.S. 402 (1985). The classic example of "excessive entanglement" is *Lemon* itself. Under the salary subsidy program in that case, the teacher, who was "employed by a religious organization, subject to the direction and discipline of religious authorities, and work[ed] in a system dedicated to rearing children in a particular faith," *id.* at 618, was simultaneously subjected to governmental monitoring to ensure against the "impermissible fostering of religion." *Id.* at 619. This clash of inconsistent obligations created "the danger that pervasive modern governmental power will ultimately intrude on religion and thus conflict with the Religion Clauses." *Id.* at 620.

The "entanglement" analysis of *Lemon* has proven fatal to a financial aid program only when two conditions are present: (1) where the "effects" analysis requires that the government ensure that aid is not used for specifically religious purposes, and (2) where the aid flows to a "pervasively sectarian" organization. In contrast, neutral funding formulas are, virtually by definition, nonentangling. When the requirement that the effects of a program neither advance nor inhibit religion is

achieved through neutrality at the level of the distribution of funds, as in *Witters*, *Mueller*, and *Walz*, there is no constitutional need to monitor the uses to which the funds are put.[17] Consequently, there is no "entanglement" problem, unless there is some other aspect of the administration of the program, not present here, that causes it. See *Mueller*, 463 U.S. at 403.[18] The entanglement analysis thus has never played an important part in this Court's first category of cases. If, as we contend, the AFLA should be upheld on the basis of its neutral distribution of funds, the "entanglement" issue need not even arise.

The "excessive entanglement" analysis of *Lemon* has frequently been criticized by members of this Court. *Aguilar*, 473 U.S. at 427-30 (O'Connor, J., dissenting); *Wallace v. Jaffree*, 472 U.S. 38, 109-10 (1985) (Rehnquist, J., dissenting); *Lemon*, 403 U.S. at 665-71 (White, J., dissenting). We believe that this case does not call for a reexamination of the "entanglement" doctrine, since the district court must be reversed under a routine application of current doctrine.

Should the Court wish to reexamine the "entanglement" doctrine, however, we would point out that intrusive government monitoring of religious functions presents more a free exercise than an establishment problem. See *Aguilar*, 473 U.S. at 410 ("the freedom of even the adherents of the denomination is limited by the governmental intrusion into sacred matters"); *Lemon*, 403 U.S. at 670 (White, J., dissenting) (issue is whether "enforcement measures would be so extensive as to border on a free exercise violation"); *NLRB v. Catholic Bishop*, 440 U.S. 490 (1979). Accordingly, it is questionable whether third

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[17] See pages 23-24, *supra*.

[18] More precisely, in these cases the "entanglement" that occurs as a result of the aid is less than the "entanglement" that would occur if the government attempted to distinguish between religious and nonreligious uses. *Walz*, 397 U.S. at 674-76. See also *Widmar*, 454 U.S. at 272, n.11.

parties, like plaintiffs-appellees, properly have standing to raise the free exercise interests of AFLA grantees, their opponents in the litigation. Perhaps the better approach is for lawsuits of this sort to determine only what restrictions on funding are necessary under the "effects" analysis, leaving it to the grantees to challenge excessively intrusive monitoring schemes under the Free Exercise Clause.

2. ***Alternatively, Under this Court's Second Category of Cases Applying the* Lemon *Test, the AFLA Should Be Upheld Insofar As Funds Have Been Used for Legitimate Statutory Purposes By Organizations That Are Not Pervasively Sectarian.***

a. *Purpose.*

The Court's second category of financial aid cases does not differ from the first in its analysis of legislative purpose. For reasons discussed above, the AFLA is unobjectionable on this score.

b. *Effect.*

The principal differences between the first and second categories of cases lie in the "effect" and "entanglement" parts of the *Lemon* test. In the second category, the Court upholds aid to religious organizations, so long as they are not "pervasively sectarian" and are prohibited from using the aid for specifically religious activities.

This approach is described in *Hunt v. McNair*, 413 U.S. 734 (1973), *Roemer Board of Public Works*, 426 U.S. 736 (1976) (plurality opinion), and *Tilton v. Richardson*, 403 U.S. 672 (1971) (plurality opinion). As these decisions demonstrate, mere religious affiliation is not sufficient to disqualify an organization from participation in a government-funded program. Instead, this Court has carefully distinguished between "pervasively sectarian" organizations, in which religious and other activities are "inextricably intertwined" (*Lemon v. Kurtzman*, 403 U.S. at 657) and other religious organizations,

which are "not 'so permeated by religion that the secular side cannot be separated from the sectarian.'" *Roemer v. Board of Public Works*, 426 U.S. at 759. *Compare Meek v. Pittenger*, 421 U.S. 349, 356 (1975), *with Roemer*, 426 U.S. at 755-59; and *Tilton*, 403 U.S. at 686-87. Organizations that are religious, but not "pervasively sectarian," are eligible for participation in publicly-funded programs on an equal basis with secular institutions, on the condition that they refrain from using the funds for "specifically religious activity." *Hunt v. McNair*, 413 U.S. at 743; *Roemer*, 426 U.S. at 759.

The AFLA program satisfies these standards. Congress has clearly stated its intention that program funds not be used for religious purposes. The Senate Report states that "the use of Adolescent Family Life Act funds to promote religion, or to teach the religious doctrines of a particular sect, is contrary to the intent of this legislation." S. Rep. 98-496, *supra*, at 10. In accordance with this directive, the Secretary has attached the following restriction to the Notice of Grant Awards:

> 7. The grantee will not teach or promote religion in the AFL Title XX program. The program shall be designed so as to be, to the extent possible, accessible to the public generally.

J.A. 757, 759, 761 (grant conditions for 1984-86). This formal proscription was bolstered by oral warnings issued to grant applicants that the promotion of religion was prohibited. J.A. 783-84. Moreover, these restrictions have teeth: On at least three occasions, grantees were warned that their prospective activities might be in violation of the grant restrictions (J.A. 671-72, 673-74, 675-76), and one grantee was dropped from the program for violation of the condition. J.A. 742-43.

The AFLA grant conditions are similar to those attached to most federal grant projects. See, *e.g.*, 20 U.S.C. 1021(c) (grants to college and research libraries may not be used for materials "for sectarian instruction or religious worship"); 29 U.S.C. 776(g) (federally-funded

handicapped rehabilitation facilities may not be "used for religious worship or any sectarian activity"); 42 U.S.C. 3027(a)(14)(A)(iv) (federally-funded senior center "will not be used and is not intended to be used for sectarian instruction or as a place for religious worship"); 24 C.F.R. 575.21 (conditions on grants to homeless shelters owned by "primarily religious organizations").

The AFLA grant restriction against teaching or promoting religion does not mean that grantees are forbidden to teach or promote practices which the AFLA is intended to promote, such as sexual self-discipline or adoption, even though these accord with the religious tenets of some religions. Secular laws dealing with adolescent pregnancy, like those against stealing, embody moral values that are not distinctively religious. Although most religions oppose stealing, the government may enact laws prohibiting stealing and may fund efforts to discourage it. The secular value against stealing would not magically turn into "religion" merely because it is promoted by a religious organization. If this were so, the state could *never* "send a cleric" to do a secular task (*Roemer*, 426 U.S. at 746) because the secular task would become the "advancement of religion" when undertaken by the cleric. As discussed above,[19] the purposes of the AFLA accord with "traditionalist" as nearly as they do with "religious" thinking. If promotion of the AFLA objectives is a secular purpose under the first part of the *Lemon* test, then it cannot be a "specifically religious" activity proscribed under the second part.

The district court ignored the AFLA grant restrictions on the ground that they were imposed administratively rather than by statute or regulation. U.S. J.S. App. 29a n.13. The court stated that the religious use restriction is "merely an unpublished administrative warning that was written at agency discretion and can be revoked by agency fiat." *Ibid.* This holding is incon-

[19] See pages 20-21, *supra*.

sistent with the law pertinent to federal grants. Grant agreements and grantor instructions are legally binding upon grantees and are enforced by audit recovery. See Comptroller General, Standards for Audit of Governmental Organizations, Programs, Activities & Functions 28 (1972); R. Cappalli, Federal Grants and Cooperative Agreements, § 6:14 (1982).[20] Grant conditions imposed by the agency, unless inconsistent with the statute, are fully authoritative and binding on the grantee. The constitutionality of a federal program does not depend upon whether grant restrictions are composed by Congress or by the agency pursuant to delegated authority.

Nor is it significant that administrative restrictions "can be revoked by agency fiat" (U.S. J.S. App. 29a n.13). In the unlikely event that the restrictions are revoked, that will precipitate a new lawsuit to challenge future grants. As long as the restrictions are in effect, the remote possibiilty of their future revocation does not make the program, as it is now constituted, unconstitutional.[21] Indeed, even if the Secretary had not imposed the prohibition on teaching or promoting religion, the proper remedy would not be to invalidate an Act of Congress, but to enjoin the Secretary to administer the statute in accordance with the Constitution. *Aguilar v. Felton*, 473 U.S. 402, 408 n.7 (1985); *Tilton*, 403 U.S. at 682-84.

The district court's findings on the characteristics of the AFLA grantees are insufficient to support a judg-

[20] The grant restriction quoted in the text is only one of 12 restrictions imposed on AFLA grantees by administrative action, including important financial and program accountability standards. See J.A. 757-68. It would severely disrupt the administration of the program for the courts to hold that such restrictions are not legally enforceable.

[21] Even if the restrictions on teaching or promoting religion were revoked in the future, the grants under challenge in this case —those for Fiscal Years 1987 and prior—would be governed by the standards in effect at the time. *Bennett v. New Jersey*, 470 U.S. 632 (1985). That remote contingency therefore cannot affect this lawsuit.

ment that the Act is unconstitutional. Each of the determinations required under *Roemer* and *Hunt*—whether a participant is pervasively sectarian and whether grant funds are used for a specifically religious purpose—must be made with particularity. As Chief Justice Burger stated for the plurality in *Tilton*, 403 U.S. at 682:

> Individual projects can be properly evaluated if and when challenges arise with respect to particular recipients and some evidence is then presented to show that the institution does in fact possess these characteristics.

See also *Roemer*, 426 U.S. at 761; *Hunt*, 413 U.S. at 744; *Wheeler v. Barrera*, 417 U.S. 402, 426-27 (1974); cf. *United States v. Salerno*, 107 S. Ct. 2095, 2100 (1987). This is especially true where, as in this case, the characteristics of the various religiously-affiliated grantees vary so dramatically, from hospitals, to civic and athletic clubs, to adoption agencies, to distinguished universities. Each of the affected grantees is different; the religious involvement ranges from purely nominal to more substantial. It is not possible to resolve these issues on the basis of sweeping generalizations.

The district court made no findings sufficient to disqualify any grantee from the AFLA. More importantly, no findings of the court could conceivably justify eliminating *all* religiously affiliated organizations from the program, without evidence that they have violated their grant agreements. Out of 23 religiously affiliated grantees, the court made reference in its opinion to only 13, of which 4 are state or local government agencies. J.A. 758-59. Eliminating the remaining grantees, solely on the basis of religious affiliation, is unprecedented, unwarranted, and inconsistent with the Free Exercise Clause. An organization that has been selected as the best possible grantee on the basis of objective, secular criteria and that has not been found to have used any of the grant funds for religious purposes cannot be denied the benefits of participating solely because of its religious affiliation.

Even as to those grantees discussed in the district court's opinion, the court applied an erroneous legal standard. If the Court concludes the AFLA should be analyzed under this second category of cases, rather than as involving a neutral funding formula, on remand the district court should apply this Court's precedents regarding pervasively sectarian organizations and use of funds for specifically religious purposes.

(1) *Pervasively sectarian grantees.* The district court did not even purport to apply this Court's standard for determining whether a grantee is pervasively sectarian. U.S. J.S. App. 24a-25a.[22] The court used the term, "pervasively sectarian," only twice in the relevant section of its opinion, neither time in reference to any particular grantee. See U.S. J.S. App. 33a, 36a. Contrast *Grand Rapids*, 473 U.S. at 394, n.12 ("In this case, the District Court explicitly found that 40 of the 41 participating nonpublic schools were pervasively religious" under the definition in *Hunt*). Here, the district court instead excluded from participation in the program all "religious organizations"—a far broader category. See *id.* at 33a, 54a-55a. The court stated (*id.* at 32a-33a):

> These facts reveal that AFLA grantees and subgrantees have included several organizations with institutional ties to religious denominations and corporate requirements that the organizations abide by

[22] The district court acknowledged that its refusal to do so was based on an "analysis" not found in this Court's cases. U.S. J.S. App. 25a. This "analysis" is that when the involvement of religious participants is "apparent on the face of the statute" this Court's precedents, such as *Hunt v. McNair*, *supra*, do not apply. *Id.* at 24a. The effect is to apply different constitutional standards to identical (and identically *neutral*) programs, solely on the basis of different statutory language. For example, the multipurpose senior center program expressly mentions "churches" as appropriate locations (42 U.S.C. 3027(a)), while the hospital construction and modernization loan program refers more generally to "nonprofit private agencies" (42 U.S.C. 291j-3(a)). Under the district court's novel analysis religious (other than pervasively sectarian) organizations could participate in the latter, but not the former. There is no reason in logic or practice for this distinction.

> and not contradict religious doctrines. In addition, other recipients of AFLA funds, while not explicitly affiliated with a religious denomination, are religiously inspired and dedicated to teaching the dogma that inspired them.

That some grantees have "institutional ties to religious denominations" is obviously insufficient to establish that they are "pervasively sectarian." See *Hunt*, 413 U.S. at 746 n.8 (the party challenging the program "failed to show more than a formalistic church relationship"). Among the AFLA grantees are organizations with such formalistic institutional ties to religion as the YWCA [23] and Emory University [24]—not to mention the very institution at issue in *Bradfield* v. *Roberts*, 175 U.S. 291 (1899).[25] If all organizations with a religious affiliation, however tenuous, must be barred from publicly-funded programs, this would work a revolution in the conduct of American social welfare.

The description of the religious colleges in *Roemer* demonstrates that an organization may have a substantial religious component to its activities without becoming "pervasively sectarian" under this Court's definition. These colleges were formally affiliated with the Roman Catholic Church, with the Church officially represented on their governing boards; they employed Roman Catholic chaplains, held religious services, and "encourage[d] . . . spiritual development"; they required religion and theology courses for their students; they opened some—in one case a majority—of their classes with prayer; some of their classrooms contained religious symbols and some instructors wore clerical garb. 426 U.S. at 755-56. Nonetheless, the Court held that these colleges were not

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[23] J.A. 499-500, 506-08, 772.

[24] Emory University is affiliated with the Methodist Episcopal Church, South. J.A. 504.

[25] See J.A. 440 (discussing the Providence Center for Life, a unit of the Providence Hospital of Washington, D.C., the hospital involved in *Bradfield*).

"pervasively sectarian" and could receive public aid. See also *Hunt*, 413 U.S. at 743-45; *Tilton*, 403 U.S. at 686-87. Indeed, the only institutions this Court has found to be "pervasively sectarian" are parochial elementary and secondary schools, which this Court has singled out as uniquely and specifically "devoted to the inculcation of religious values and belief," an objective which is " 'the only reason for the schools' existence.' " *Meek v. Pittenger*, 421 U.S. at 366 (quoting *Lemon*, 403 U.S. at 657) (Brennan, J., concurring)). See also *Aguilar v. Felton*, 473 U.S. 402, 411, 412 (1985).

None of the grantees in this case has been shown to be more pervasively sectarian than the colleges in *Roemer*, *Hunt*, and *Tilton*. Indeed, the grantees conspicuously lack most of the characteristics recently mentioned by this Court as distinguishing pervasively sectarian institutions: none of the AFLA grantees "include prayer and attendance at religious services as part of their curriculum"; none have "student bodies composed largely of adherents of the particular denomination"; and none "give preference in attendance to children belonging to the denomination." [26] *Grand Rapids*, 473 U.S. at 384, n.6. Perhaps on remand one or more grantees will be disqualified on this standard, but the district court made no such findings.

In addition to its focus on mere "institutional ties," the district court looked to whether grantees have "corporate requirements that the organizations abide by and not contradict religious doctrines." U.S. J.S. App. 33a. We object strenuously to using this as a basis for exclusion. Unless an organization's obedience to religious doctrine interferes in some way with its ability to fulfill the program's secular objectives, the organization has the right under the Free Exercise Clause to observe religious doctrine without suffering a financial penalty.

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[26] Indeed, the grantees are expressly required to make their programs available to the public generally. J.A. 757, 759, 761 (Condition No. 7).

Sherbert v. Verner, *supra*. The only examples the court mentioned of organizations that enforce religious doctrines are some that do not assist in abortions or artificial contraception. These limitations merely echo restrictions imposed by Congress itself;[27] they can hardly be said to interfere with the grantee's ability to perform its statutory functions.

Finally, the district court's notion that an organization "without discernable [sic] religious ties" (U.S. J.S. App. 35a) can (and must) be excluded from the AFLA because its founders were "religiously inspired" (*id.* at 33a) is frighteningly hostile to religious belief. It is one of the central tenets of our constitutional creed that all citizens must be treated equally by our government, without regard to their religious beliefs or lack of them. See *McDaniel v. Paty*, 435 U.S. at 626-27; *Cantwell v. Connecticut*, 310 U.S. 296, 304 (1940). In its concern for achieving pristine secularism in the AFLA program, the district court lost sight of the wider, and more important, issues of religious freedom that lie at the heart of the First Amendment. Once again, the issue should be whether a grantee can live up to the objective, secular criteria of the program, including the prohibition on religious uses—not whether its founders' inspiration comes from the gospels, the Torah, or *Humanae Vitae*.

In no instance did the district court evaluate whether a grantee was capable of separating secular from sectarian activities. Accordingly, its decision that all religiously-affiliated organizations must be barred from the program should be reversed.

(2) *Specifically religious activities.* Nor did the district court establish that any of the AFLA grantees have violated the terms of the grant by using AFLA funds to teach or promote religion. The instances of alleged mis-

[27] The AFLA generally prohibits grantees from using funds "for the provision of family planning services" (42 U.S.C. 300z-3(b)(2)) and for abortions or abortion referrals (42 U.S.C. 300z-10(a)).

conduct recited in the opinion (U.S. J.S. App. 33a-38a) turn out, on closer inspection, to be more smoke than fire.

The court's first example is St. Margaret's Hospital, a religiously-affiliated hospital. U.S. J.S. App. 33a-34a. St. Margaret's infraction is that it told an AFLA-funded employee that he had to conform to the institution's "Ethical and Religious Directives." As discussed above, this is the hospital's prerogative and constitutional right, and can be objectionable only if the ethical and religious directives conflict in some way with the AFLA's secular purposes.

A similar charge is laid against St. Ann's Infant and Maternity Home, a Roman Catholic institution, whose religious standards duplicate the secular standards set forth in the AFLA itself. U.S. J.S. App. 34a.[28] The court also noted that some of St. Ann's AFLA projects "are directed by members of religious orders," a circumstance that, in itself, has been held by this Court to be constitutionally unobjectionable. *Roemer*, 426 U.S. at 757; see *id.* at 746 ("It has long been established, for example, that the State may send a cleric, indeed even a clerical order, to perform a wholly secular task"); *Bradfield*, 175 U.S. at 298 ("the fact that [the hospital's] members . . . are members of a monastic order or sisterhood . . . is wholly immaterial").

Finally, the court stated that St. Ann's AFLA programs "base their curriculum on materials with explicitly religious content." U.S. J.S. App. 34a. One has to read this statement several times, very carefully, in conjunction with the accompanying footnote 15, to understand it. The court did not find that the curriculum used in the AFLA project *contains* any religious material—just that the curriculum was "based on" materials with religious content. The footnote explains that "there is a dispute as to whether this religious material was taught, but there is no dispute that the curriculum that was taught was at least based on these materials,

[28] See note 27, *supra*.

which spoke in terms of Church teachings on sexual matters and contained several references to God." *Id.* at 34a n.15. Since this case was decided in favor of plaintiffs-appellees on summary judgment, any factual dispute must be resolved in favor of the parties opposing the motion. *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 158-59 (1970). In other words, the district court was required to assume that *no religious materials were actually taught.* In fact, the record shows that St. Ann's complied with the Notice of Grant Award by removing references to God and to church teachings from the curriculum before using it in the AFLA project. J.A. 441.[29]

The most troubling alleged infractions mentioned by the district court were a grantee that included "spiritual counseling" in its AFLA program and one that allowed a cleric to follow up an AFLA presentation with a presentation of religious views on the same subject. U.S. J.S. App. 36a, 37a. What the court did not point out is that the proposal for spiritual counseling was *rejected* by the Secretary as "*not legally permissible*" (J.A. 676, emphasis in original), and the clerical presentation was by a grantee, Catholic Charities of the Diocese of Arlington, that was subsequently barred from the program for violation of the Notice of Grant Award. J.A. 742-43.

The court also observed that "the overwhelming number of comments shows that program participants believed that these federally funded programs were also sponsored by the religious denomination," stating that "[t]his appearance of joint action provides a significant symbolic benefit to religion." U.S. J.S. App. 37a, 38a. It is difficult to know where this argument leads. Presumably, patients at the hospital in *Bradfield* and students at the colleges in *Tilton*, *Hunt*, and *Roemer* believed that the facilities were "also sponsored" by the religious institutions that were grantees in those cases. Indeed, *whenever* the government accomplishes its purposes by making a grant to a private organization it will create the (quite accurate) "appearance" that the project is a joint effort between the grantee and the government. If this is a test of unconstitutionality, no religious organization can ever be a grantee in any government program.

[29] St. Ann's also stopped distributing certain books to AFLA participants upon warning from HHS. J.A. 673-74.

This Court need not review each of the district court's factual findings in detail. The point is simply that the findings, taken individually and as a whole, are insufficient to justify striking down the entire program. We are fully in agreement that any grantees that are found to violate the terms of the grant should be disciplined and, in appropriate cases, excluded. The innocent, however, should not be punished along with the guilty. Religious affiliation is not a constitutionally permissible basis for imposing guilt by association.

c. *Entanglement.*

The second category of this Court's cases (no specifically religious uses or pervasively sectarian grantees) also differs from the first (neutral distribution of funds) in that the issue of "excessive entanglement" becomes significant. Because of the need for monitoring the uses to which government funds are put, there arises a danger of church-state conflict. The only context in which this conflict has been held to be so "excessive" that it can invalidate an otherwise neutral program, however, has been where "comprehensive, discriminating, and continuing state surveillance" is required of pervasively sectrian institutions. *Lemon*, 403 U.S. at 619. This Court has never struck down a program of aid that passes the first two parts of the *Lemon* test on "entanglement" grounds unless the organization involved has been found to be pervasively sectarian.

There are two reasons why the "entanglement" analysis does not apply with full force to religiously affiliated organizations that are not "pervasively sectarian." First, the grant agency and reviewing court can be much more confident that aid given for secular purposes will be used

for those purposes. As the Court noted in *Roemer*, where the grantee is not pervasively sectarian there is a "substantially reduced danger" that "an ostensibly secular activity . . . will actually be infused with religious content or significance." The "need for close surveillance of purportedly secular activities is correspondingly reduced." *Id.* at 762. Indeed, in such cases the reviewing court will "assume that the [grantees] will exercise their delegated control over use of the funds in compliance with the statutory, and therefore the constitutional, mandate." *Roemer*, 426 U.S. at 755, 760. See also *Hunt v. McNair*, 413 U.S. at 746; *Tilton*, 403 U.S. at 687.

Second, and more fundamentally, government surveillance of the secular components of religiously affiliated organizations is not as much an "intrusion into sacred matters." *Aguilar*, 473 U.S. at 410. For government to monitor the activities of persons under church discipline, dedicated to the core religious functions of the organization, presents a direct clash between competing authorities: "entanglement" is almost too soft a word. For government to monitor the activities of a separable secular unit of a religiously affiliated organization does not present the same problem; the organization stands in no different position than any other grantee. Thus, the monitoring required of organizations that are not pervasively sectarian is both less intensive and less objectionable than the monitoring of pervasively sectarian grantees. Religious organizations can and should be subject to the same degree of monitoring imposed upon any other grantee to ensure that grant funds are used exclusively for statutory purposes.

As noted above, the district court did not determine which, if any, of the AFLA grantees are pervasively sectarian.[30] The district court therefore erred in holding that grants to religious organizations under the Act violate the "entanglement" prong of the *Lemon* test.

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[30] See pages 37-40, *supra*.

3. *The District Court Misapplied This Court's Precedents Regarding Aid to Parochial Schools*

The district court's opinion relies entirely on cases falling into this Court's third category: those involving aid that is targeted to pervasively sectarian parochial elementary and secondary schools. The court did not so much as attempt to distinguish cases like *Witters* or *Bradfield*. Since the AFLA involves aid that is distributed neutrally to religious and nonreligious organizations of varying descriptions, the court's selective reliance on the parochial school cases is highly misleading.

In the parochial school cases relied on by the district court, the vast preponderance of aid goes (and is specifically tailored to go) to religious institutions. See *Grand Rapids*, 473 U.S. at 384; *Aguilar*, 473 U.S. at 411-12; *Nyquist*, 413 U.S. 756, 782 n.38, 794 (1973). As this Court stated in *Sloan v. Lemon*, 413 U.S. 825, 832 (1973) (emphasis in original):

> The State has singled out a class of its citizens for a special economic benefit. Whether that benefit be viewed as a simple tuition subsidy, as an incentive to parents to send their children to sectarian schools, or as a reward for having done so, at bottom its intended consequence is to preserve and support religion-oriented institutions. We think it plain that this is quite unlike the sort of 'indirect' and 'incidental' benefits that flowed to sectarian schools from programs aiding *all* parents by supplying bus transportation and secular textbooks for their children.[31]

Parochial school aid is thus easily distinguishable from the AFLA, where only a small part of the aid goes to religious organizations. The AFLA provides neither "incentive" nor "reward" for religious choices; it is simply

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[31] Early on, the Court rejected the argument that aid to parochial schools is a neutral effort to provide benefits to private schoolchildren comparable to the free education given to public schoolchildren. *Nyquist*, 413 U.S. at 782 n.38; cf. *id.* at 803 (Burger, C.J., dissenting).

neutral. See *Witters*, 106 S. Ct. at 752; *Walz v. Tax Commission*, 397 U.S. at 689 (Brennan, J., concurring).

A second ground of distinction is that parochial school aid cases are expressly premised on actual factual findings that the schools involved are pervasively sectarian, within this Court's definition of that term. See, *e.g.*, *Grand Rapids*, 473 U.S. at 384-85. No such finding has been made here.

A third ground of distinction is that parochial elementary and secondary schools are designed to create a total environment in which religious teachings are made a part of the student's ordinary life. See *Grand Rapids*, 473 U.S. at 379 (quoting a parochial school's statement of its goal to create a "God oriented environment which *permeates* the total educational program" (emphasis in original)). Most AFLA programs consist in comparatively brief encounters, devoted to a single purpose. There is little opportunity for the development of long-term relationships, no danger of the teenagers confusing the AFLA program with surrounding religious schooling, and no design to inculate religious doctrine.

In using the parochial school aid precedents in this case, the district court has dramatically changed the rules of the game in the social welfare field, which had remained settled since *Bradfield* almost a century ago. For a variety of reasons, aid to parochial schools had been an especially sensitive and divisive issue, and the standards applied in that context have been especially stringent. *Grand Rapids*, 473 U.S. at 383. The stringent tests developed for parochial school aid have never been applied by this Court in any other context.

In particular, the Court has distinguished between aid to the educational functions of religious institutions and aid to their health and welfare functions. See *Wolman v. Walter*, 433 U.S. 229, 244 (1977) (plurality opinion per Blackmun, J.); *id.* at 259 (Marshall, J., concurring in part); *id.* at 266 (Stevens, J., concurring in part);

Lemon v. Kurtzman, 403 U.S. at 644 (Douglas, J., concurring in part); see also *Bradfield v. Roberts*, *supra*.[32] Justice Marshall has explained:

> General welfare programs, in contrast to programs of educational assistance, do not provide '[s]ubstantial aid to the educational function' of schools, whether secular or sectarian, and therefore do not provide the kind of assistance to the religious mission of sectarian schools we found impermissible in *Meek*. Moreover, because general welfare programs do not assist the sectarian functions of denominational schools, there is no reason to expect that political disputes over the merits of those programs will divide the public along religious lines.

Wolman, 433 U.S. at 259-60 (concurring and dissenting opinion) (citation and footnote omitted).

The district court therefore erred in relying exclusively on the parochial school cases. But even assuming that some AFLA grantees (those found on remand to be pervasively sectarian) must be accorded the same constitutional treatment as the parochial schools, the court further erred in failing to distinguish between the various types of services provided by grantees under the AFLA. This Court has repeatedly held that services that offer no opportunity for religious indoctrination, but serve an important social welfare function, may be provided at public expense even by pervasively sectarian institutions like parochial schools. *Lemon*, 403 U.S. at 616-17. These services include transportation, textbooks, food, diagnostic services, state-mandated standardized tests, and the like. *Committee for Public Education v. Regan*, 444 U.S. 646 (1980); *Wolman v. Walter*, *supra*; *Lemon v. Kurtzman*, 403 U.S. at 616; *Board of Education v. Allen*, 392 U.S. 236 (1968); *Everson*, *supra*.

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[32] And see pages 14-17, *supra*, describing the extent of involvement by religious organizations in publicly-supported social welfare activities.

The district court, however, failed to draw any distinction between the various services provided under the AFLA. The opinion discusses only projects involving sex education and counseling (U.S. J.S. App. 27a-32a ("effects"), 40a-41a ("entanglement")), yet the judgment extends to all services provided under the Act. Even if the Court analyzes the AFLA under the school aid precedents, on remand the district court should determine which, if any, of the AFLA-funded services present a "substantial risk" that they might be "used for religious educational purposes." *Grand Rapids*, 473 U.S. at 388; *Committee for Public Education v. Regan*, 444 U.S. at 656.[33]

A wide array of services are provided by grantees under the AFLA. Some projects are designed to rescue and rehabilitate adolescents who have been entrapped by drugs and prostitution;[34] many more provide homes for unwed adolescent mothers with attendant medical and nutritional care;[35] others provide pregnancy testing and related health services;[36] others assist with adoptions.[37] These services are not different in character from social welfare services provided routinely, without controversy, by religious and nonreligious grantees under other federal, state, and local programs. They have no connection to any program of sectarian instruction and are exceedingly unlikely to become infused with religious indoctrination.

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[33] There is no requirement of certainty. This Court has made clear that, in order to justify prohibition under the Establishment Clause, the risk that government resources will be used for religious purposes must be "unacceptable," "too great a risk," or "substantial." *Grand Rapids*, 473 U.S. at 384, 385, 386.

[34] See, *e.g.*, J.A. 639-41 (Convenant House of New York).

[35] See, *e.g.*, J.A. 437 (St. Ann's Infant & Maternity Hospital of Maryland); J.A. 458 (St. Mary's Home).

[36] See, *e.g.*, J.A. 464-65 (St. Margaret's Hospital); J.A. 645-47 (Brightside for Children and Families, Our Lady of Providence Children's Center of West Springfield, Mass.).

[37] See, *e.g.*, J.A. 497 (Catholic Social Services of Baton Rouge).

The district court provided no reason why the delivery of noneducational care services under the AFLA should be disturbed.

D. The Judgment Below Is Vastly Overbroad.

We believe that the AFLA is entirely constitutional insofar as it distributes funds for a secular purpose among a broad spectrum of public and private organizations, neither favoring nor disfavoring religion. Even assuming *arguendo*, however, that some applications of the AFLA may be unconstitutional, the district court was premature in granting so sweeping an injunction on a motion for summary judgment. The result is to violate the Free Exercise clause by excluding organizations for no reason other than their religious affiliation or inspiration.

Specifically, the judgment is overbroad in that it bars from involvement in the AFLA organizations that neither are pervasively sectarian nor have used AFLA funds to teach or promote religion. Indeed, many of these organizations were barred even though there was no evidence submitted against them—apart from their bare religious tie. The judgment is also overbroad in that it bars religious organizations from participating in aspects of the AFLA program that are wholly unrelated to religious indoctrination and that are routinely carried out with public support in other contexts. At a minimum, therefore, this Court should reverse the district court and order a more tailored remedy, based on specific factual findings.

The district court's holding that the AFLA is invalid on its face is plainly erroneous; there are many neutral applications of the AFLA that in no way violate the Constitution. This Court should reaffirm the fundamental principle of neutrality: religious organizations should be permitted to participate in public programs on an equal footing, subject to the same requirements as other private groups. Our constitutional commitment to pluralism

demands—above all in sensitive value-laden areas—that resources be distributed to the widest possible array of private associations consistent with the secular purposes of the program. Religion is an inappropriate basis for distinction in the social welfare programs of this country.

CONCLUSION

The judgment of the district court should be reversed.

Respectfully submitted.

MICHAEL W. MCCONNELL
1111 E. 60th Street
Chicago, IL 60637
(312) 702-3306
Counsel of Record

EDWARD R. GRANT
JAMES MICHAEL THUNDER
CLARKE D. FORSYTHE
AMERICANS UNITED FOR LIFE
LEGAL DEFENSE FUND
343 S. Dearborn Street Rm. 1804
Chicago, IL 60604
(312) 786-9494

PAUL ARNESON
1701 Pennsylvania Ave., Suite 940
Washington, D.C. 20006
(202) 785-0530

MICHAEL J. WOODRUFF
MICHAEL STOKES PAULSEN
c/o CENTER FOR LAW &
RELIGIOUS FREEDOM
P.O. Box 1492
Merrifield, VA 22116
(703) 560-7314

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v.

CHAN KENDRICK, ET AL.

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, APPELLANT

v.

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CHAN KENDRICK, ET AL., CROSS-APPELLANTS

v.

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

JOINT APPENDIX
VOLUME I

JANET BENSHOOF
LYNN M. PALTROW
DAWN JOHNSEN
RACHAEL PINE
American Civil Liberties Union Foundation
132 W. 43rd Street
New York, New York 10036
(212) 944-9800

BRUCE J. ENNIS
Ennis, Friedman, Bersoff & Ewing
1200 17th St., N.W.
Suite 511
Washington, D.C. 20036
(202) 775-8100

Counsel for Appellees and Cross-Appellants

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

Counsel for Appellant and Cross-Appellee

MICHAEL W. MCCONNELL
1111 E. 60th Street
Chicago, Illinois 60637
(312) 702-3306

Counsel for United Families of America

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Case No. Civ. 83-3175

10/26/83

1. COMPLAINT; Attachments; Appearance. (io)

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12/29/83

6. AMENDED COMPLAINT of plaintiffs. (io)

1/16/84

9. ANSWERS of Federal defendants to plaintiffs' first set of interrogatories to defendant Heckler. (ew)

10. ANSWERS of federal defendants to plaintiffs' first set of interrogatories to defendant Mecklenburg; Tab A-J. (ew)

11. JOINT MOTION (filed 1/13/84) to submit agreed statement of material facts not in dispute out of time. ("Let this be filed") (fiat) RICHEY, J. (io)

1/17/84

12. AGREED STATEMENT of material facts not in dispute by plaintiffs and defendants. (Filed 1/13/83)

13. ANSWER of defendants to amended complaint. ("Let this be filed") (fiat) RICHEY, J. (io)

3/14/84

52. STIPULATION by plaintiffs and defendants concerning identities of readers and reviewers

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3/20/84

51. ANSWERS by plaintiffs to defendants' first request for production of documents to plaintiffs and defendants' first set of interrogatories to plaintiffs. ("Let this be filed") (Signed 3/19/84) RICHEY, J. (mj)

3/26/84

55. DEPOSITION of Patrick J. Sheeran taken 2/7/84 on behalf of parties; errata sheets; Exhibits 1 thru 47. COURT COPY (io)

56. DEPOSITION of Patrick J. Sheeran taken 2/8/84 on behalf of parties; errata sheets; Exhibits 1 thru 16. COURT COPY (io)

57. DEPOSITION of Patrick Sheeran taken 2/22/84 (continue) on behalf of parties; errata sheets; Exhibits 1 thru 114. COURT COPY (io)

3/28/84

59. DEPOSITION of Mary Christine O'Keefe taken 3/20/84 on behalf of plaintiffs; signature waived. COURT COPY (io)

60. DEPOSITION of Robert A. Hutson taken 3/20/84 on behalf of plaintiffs; signature waived; Exhibits 1 thru 5. COURT COPY (io)

4/ 5/84

67. TRANSCRIPT OF PROCEEDINGS from 3/8/84; pages 1 thru 43; (Rep: Mindi L. Colchico). COURT COPY (io)

4/16/84

70. NOTICE of plaintiffs of filing corrections/ amendments to plaintiffs' answers to defendants' first set of interrogatories filed 3/13/84. (io)

72. SUPPLEMENTAL ANSWERS of plaintiffs to defendants' first set of interrogatories. (io)

4/18/84

74. DEPOSITION of Barbara Rosengard taken on March 2, 1984 on behalf of the plaintiffs; Errata Sheet; Exhibits 1 thru 7. (mj)

4/20/84

75. DEPOSITION of Margaret Anne Ridder taken 2/1/84 on behalf of plaintiffs; errata sheet; Exhibits 1 thru 8. COURT COPY (io)

76. DEPOSITION of Jean M. Larson taken 2/1/84 on behalf of plaintiffs; signature waived; Exhibits 1 thru 6. COURT COPY (io)

77. DEPOSITION of John Charles Lothamer, Jr. taken 2/1/84 on behalf of plaintiffs; signature waived; Exhibits 1 thru 13. COURT COPY (io)

78. DEPOSITION of Linda Ann Cullen taken 2/2/84 on behalf of plaintiffs; signature waived; Exhibits 1 thru 6. COURT COPY (io)

79. DEPOSITION of John D. Hortun taken 2/2/84 on behalf of plaintiffs; signature waived; Exhibit 1. COURT COPY (io)

80. DEPOSITION of Elizabeth N. West taken 2/2/84 and 2/3/84 on behalf of plaintiffs; errata sheet; Exhibits 1 thru 19. COURT COPY (io)

4/30/84

88. RESPONSE of defendants to plaintiffs' first request for production of documents. (io)

89. ANSWERS of defendants to plaintiffs' second set of interrogatories. (io)

5/ 9/84

91. SUPPLEMENTAL INTERROGATORY ANSWERS of plaintiffs to defendants' first set of interrogatories and first request for production of documents. (io)

5/14/84

92. DEPOSITION of Sister Elyse Staab taken on behalf of plaintiffs on 3/21/84. (ew)

93. DEPOSITION of Sister Betty Ann McNeil taken on behalf of plaintiffs on 3/21/84. (ew)

5/23/84

94. STIPULATION filed 5/17/84 directing that the following deposition exhibits and pages are sealed:
1. Underwood Deposition Exhibits 3, 4 and 8;
2. David Deposition Exhibits 3, 4, 6 and 7;
3. David Deposition pages 35-36;
4. Thompson Deposition Exhibit 1, Approved. (fiat) (N) RICHEY, J. (fs)

95. ANSWERS of defendants to plaintiffs' third set of interrogatories. (io)

97. DEPOSITION of Julianne Davis taken 4/10/84 on behalf of plaintiffs; errata sheet; Exhibits. COURT COPY (io)

6/ 4/84

99. RESPONSE of defendants to plaintiffs' second request for production of documents; Exhibits A through C; Volumes 1 through 5. (io)

6/ 5/84

100. STIPULATION directing that the following portions of the transcript of the deposition of Ernest Peterson and Patrick Sheeran be sealed: Peterson Exhibits 2, 3, 4, and 5;

Peterson deposition pages 45-47 and 49-50; Sheeran Exhibits 38, 39, 40, 41, 42, and 43: Sheeran deposition, page 561 approval (fiat) (N) RICHEY, J. (nb)

101. PAGES 35 and 36 Exhibits 3, 4, 6 and 7 to Davis deposition filed 5/23/84 SEALED. (Place in safe in Room 1800 pursuant to order of 5/17/84) RICHEY, J. (io)

6/ 8/84

102. STIPULATION directing that the following portions of the transcripts of the deposition of Marjory Mecklenburg be sealed: Exhibits 3, 4, 5, 6, 7, 13, 14, 15 and 16; pages 109, 112-124, 126-129, 131-140, 266-269, 271, 272, 330-334, approved. (fiat) (N) RICHEY, J. (io)

6/11/84

104. EXHIBITS 1 thru 3 to the deposition of Sister Elyse Staab filed 5/14/84. (io)

105. EXHIBITS 1 thru 6 to the deposition of Sister Betty Ann McNeil filed 5/14/84. (io)

106. EXHIBITS 1 thru 28 to the deposition of Christine O'Keefe filed 3/28/84. (io)

6/19/84

107. DEPOSITION of Donald Underwood taken 4/11/84 on behalf of plaintiffs; errata sheet; Exhibits. COURT COPY (io)

108. DEPOSITION of Patricia G. Thompson taken 4/12/84 on behalf of plaintiffs; Exhibits 1 thru 9. COURT COPY (io)

109. DEPOSITION of Marjory E. Mecklenburg taken 4/18/84 on behalf of plaintiffs; errata sheet. COURT COPY (io)

110. DEPOSITION of Ernest G. Peterson taken 4/17/84 on behalf of defendants; errata sheet; Exhibits 1 thru 153 (filed in clear binder). (io)

111. DEPOSITION of Marjory E. Mecklenburg taken 4/19/84 on behalf of plaintiffs; errata sheets; Exhibits. COURT COPY (io)

112. DEPOSITION of Patrick J. Sheeran taken 4/19/84 on behalf of plaintiffs; errata sheets; Exhibits. COURT COPY (io)

113. DEPOSITION OF UNDERWOOD taken on 4/11/84 (Exhibits 3, 4 and 8.) FILED UNDER SEAL – (FILED IN ROOM 1800). (mj)

114. DEPOSITION OF THOMPSON taken on 4/12/84 (Exhibit 1). FILED UNDER SEAL – FILED IN 1800. (mj)

115. DEPOSITION OF ERNEST PETERSON taken on 4/17/84 (pages 45-47 and 49-50). FILED UNDER SEAL – FILED IN ROOM 1800. (mj)

115. DEPOSITION of ERNEST PETERSON taken on 4/17/84 (Exhibit Nos. 2, 3, 4 and 5.) FILED UNDER SEAL – FILED IN ROOM 1800.

116. DEPOSITION of MARJORY MECKLENBURG taken on 4/18/84 (pages 109, 112-124, 126-129 and 131-140). (Exhibits 3 through 7 and 13 through 16) (pages 266-269, 271, 272, 330-334). FILED UNDER SEAL – ROOM 1800. (mj)

117. DEPOSITION of SHEERAN taken on 4/19/83 (page 561). (Exhibits 38-43). FILED UNDER SEAL – ROOM 1800. (mj)

6/25/84

118. DEPOSITION of Emmett W. Cocke taken on 4/19/84; Exhibits. (ew)

119. DEPOSITION of Homer A. Goodard taken on 4/19/84; Exhibits. (ew)

120. DEPOSITION of Jack A. Luxenburg taken on 4/19/84; Exhibits. (ew)

121. DEPOSITION of Lawrence W. Buxton taken on 4/20/84; Exhibits. (ew)

122. DEPOSITION of Robert E. Vaughn taken on 4/20/84; Exhibits. (ew)

7/ 9/84

124. DEPOSITION of Kay Ek taken on 4/3/84; Errata sheet, Exhibits 1 through 12. (mj)

125. DEPOSITION of Reverend John E. Forliti taken on 4/4/84; Errata Sheet; Exhibits (Separate Binder). (mj)

7/25/84

130. TRANSCRIPT of proceedings held 7/11/84; pages 1 thru 35; (Rep: Mindi L. Colchico). (mj)

7/27/84

131. STIPULATION filed 7/26/84 directing that page 143 of the Marjory Mecklenburg deposition be sealed, approved. (fiat) (N) RICHEY, J. (io)

10/ 3/84

136. RESPONSE of plaintiffs to defendants' first request for admissions. (io)

137. RESPONSES of plaintiffs to defendants' second set of interrogatories. (io)

10/22/34

141. NEGOTIATED FACTS by plaintiffs filed as of 10/22/84. (11 – Facts Attached).

10/25/84

143. NOTICE of plaintiffs of filing additional negotiated facts. (io)

10/26/84

144. MOTION of Sammie J. Bradley, Katherine K. Warner, and United Families of America for leave to intervene; memorandum in support; affidavits of Katherine K. Warner; and Sammie Jean Bradley; Exhibit (Answer to amended complaint); $5.00 USCA fees paid and credited to U.S. Treasury; (Appearance: Paul Arneson; 1101 Connecticut Avenue, NW; 20036; (202) 659-8201). (io)

10/31/84

146. ORDER filed 10/30/84 granting leave to Sammie J. Bradley, Katherine K. Warner, and United Families of America to intervene as parties defendant in this action. (N) RICHEY, J. (io)

147. ANSWER to defendants-intervenors Bradley; Warner; and United Families of America to amended complaint. (io)

11/ 5/84

148. ORDER filed 10/31/84 vacating court's order of 10/30/84 allowing Sammie J. Bradley, Katherine K. Warner and United Families of America to intervene as a party defendant. (N) RICHEY, J. (io)

149. TRANSCRIPT OF PROCEEDINGS from 10/31/84; pages 1 thru 37; (Rep: Harry Deutsch). (io)

11/13/84

151. MEMORANDUM of plaintiffs in opposition to motion for leave to intervene; Exhibits 3 and 4. (io)

11/14/84

153. RESPONSE of defendants to motion for leave to intervene. (io)

11/19/84

155. NOTICE of plaintiffs of filing motion for summary judgment; motion for summary judgment; p&a's in support; table of contents; table of authorities; statement of material facts, Volumes I through III; Appendix, Volumes I through VI (filed in white binders). (io)

11/27/84

156. AFFIDAVIT of Reverend John Philip Wogaman. (mj)

157. ORDER filed 11/26/84 admitting Grover Rees III to appear pro hoc vice on behalf of defendants-intervenors Bradley, Warner, and United Families of America along with counsel Paul Arneson of Williams and Jensen. (N) (Signed 11/21/84). RICHEY, J. (mj)

158. ORDER granting motion of defendants-intervenors to intervene; directing that the intervenors will take no further discovery and will respond to plaintiffs' motion for summary judgment no later than 11/27/84 and file their own dispositive motion by 12/3/84. (Signed 11/21/84). (N) RICHEY, J. (mj)

12/ 4/84

161. MOTION by Americans United for Life, Inc. to file Brief *Amicus Curiae* in opposition to plaintiffs' motion for summary judgment; p&a's; Exhibit (Brief of *Amicus Curiae*) filed as of 11/29/84. (mj)

162. MOTION by defendants-intervenors for summary judgment. Statement of material facts; Motion in support of motion for summary judgment; Table of Contents; Appendices A through D. (mj)

12/ 5/84

163. MOTION by United States Catholic Conference for leave to file Memorandum *Amicus Curiae* and p&a's in support of motion; Exhibit (Memorandum of Points and Authorities of the U.S. Catholic Conference as *amicus curiae* in support of defendants). (mj)

12/ 7/84

164. NOTICE OF FILING by defendants; Declaration of Maurice E. Weir. (mj)

166. MOTION by defendants for judgment on the pleadings or in the alternative for summary judgment; p&a's; Table of Contents; Table of Authorities; Declaration of Theodore C. Hirt. (mj)

12/12/84

167 MOTION by defendant/intervenors for leave to file corrected copies; EXHIBIT (Motion for summary judgment-corrected copy). (mj)

12/14/84

170. ORDER granting motion of defendant/intervenors for leave to file corrected copies of their motion for summary judgment and in opposition to plaintiffs' motion for summary judgment. (N) RICHEY, J. (mj)

171. MOTION by defendant-intervenors for summary judgment. Statement of material facts; p&a's; Table of Contents; Table of Authorities (mj)

174. BRIEF filed as of 12/13/84 of *Amicus Curiae,* Americans United for Life, Inc., in opposition to plaintiffs' motion for summary judgment. (mj)

175. MEMORANDUM OF POINTS AND AUTHORITIES filed as of 12/13/84 of the U.S. Catholic Conference as *Amicus Curiae* in support of defendants. (mj)

1/22/85

181. NOTICE OF FILING by defendants; Memorandum of points and authorities in opposition to plaintiffs' motion for summary judgment on Count II of the amended complaint and in support of defendants' motion for summary judgment; Table of Contents; Table of Authorities; Appendix; defendants' response to plaintiffs' statement of material facts—(3 volumes); defendants statement of material facts—(4 volumes); Declarations—(2 volumes); Table of Contents of volumes; Administrative Records—(8 volumes). (mj)

2/25/85

185. OPPOSITION by plaintiffs to defendants' motions for summary judgment and for judgment on the pleadings, and reply to defendants' opposition to plaintiffs' motion for summary judgment; Table of Contents; Table of Authorities; response to defendant-

intervenors' statement of material facts; statement of material facts with plaintiffs' characterization of defendants' response (volumes I through III); response to defendants' statement of material facts; Appendix of supplemental affidavits and exhibits; statistical and narrative summaries of defendants' responses to plaintiffs' material facts. (mj)

3/11/85

188. NOTICE by plaintiffs of motion for leave to file signed affidavits; affidavit authenticating drafts of the Adolescent Family Life Act; affidavit of Margaret Traxler; attachment; affirmation of plaintiffs' counsel in support of motion to file signed affidavits. (aw)

3/13/85

189. MEMORANDUM OF POINTS AND AUTHORITiES by plaintiffs. *Amici Curiae* in support of motion for summary judgement; Table of Contents; Table of Authorities. (aw)

3/27/87

190. ORDER allowing plaintiffs to file signed affidavits of Asta Kenney and Margaret Traxler. (N) RICHEY, J. (aw)

4/ 3/85

192. NOTICE by plaintiffs to amend the record of plaintiffs' supplemental appendix, filed 2/25/85.

193. MOTION by plaintiffs to amend record; attachment. (aw)

194. AFFIRMATION by plaintiffs counsel in support of motion to amend the record. (aw)

4/11/85

196. REPLY by defendant-intervenors to plaintiffs opposition to defendant-intervenors' motion for summary judgment; Table of Contents; Table of Authorities; preliminary statement. (aw)

197. RESPONSE by defendants to plaintiffs' statistical and narrative summaries of defendants' responses to plaintiffs' material facts. (aw)

198. REPLY by defendants of memorandum of points and authorities in support of defendants' motion to dismiss, or in the alternative, for judgment on the pleadings and in support of defendants' alternative motion of summary judgment on Count II of the complaint; attachments. (aw)

5/ 7/85

201. ORAL motion of defendant-intervenors for leave for Edward R. Grant to appeal pro hoc vice heard and granted; cross motion of parties for summary judgment heard and taken under advisement. Rep: H. Deutsch. RICHEY, J. (hls)

5/ 8/85

202. NOTICE OF FILING by defendant of declaration of Thomas F. Duncan, M.D.; attachment. (hls)

5/24/85

204. RESPONSE by defendants to plaintiffs' 5/15/85 submission regarding Decker v. O'Donnell. (hls)

5/31/85

205. NOTICE OF FILING by defendant; attachment. (hls)

6/ 7/85

206. NOTICE of filing by plaintiffs; attachment. (hls)

6/14/85

207. NOTICE of filing by plaintiffs; plaintiffs' response to defendants' memorandum of law of 5/24/85 and post summary judgement submission of the affidavit of Dr. Thomas F. Duncan. (hls)

6/18/85

208. RESPONSE by defendant to plaintiffs' 6/6/85 notice of filing. (hls)

7/10/85

210. NOTICE of filing by plaintiffs a supplementary memorandum on new Supreme Court Opinion on the establishment clause; addendum 1 through 5. (hls)

211. SUPPLEMENTAL memorandum of law by defendant-intervenors in support of motion for summary judgment. (hls)

213. MEMORANDUM of the United States Catholic Conference *Amicus Curiae* concerning Supreme Court establishment clause cases. (hls)

7/15/85

215. MEMORANDUM by defendant in response to the Court's 7/2/85 order; table of contents; table of authorities. (hls)

8/ 8/85

216. MEMORANDUM by defendants in response to plaintiffs July 9, 1985 supplemental memorandum; memorandum by defendants; attachments. (aw)

8/12/85

217. TRANSCRIPT OF PROCEEDING taken 5/7/85; pages 1 through 136; Rep: Harry Deutsch. (dj)

10/ 9/85

218. MEMORANDUM by defendants of P&As in response to plaintiffs' list of statutes invalidated on their face. (df)

10/21/85

219. NOTICE of filing by plaintiffs; plaintiffs' brief response to defendants' latest memo dated 10/9/85. (hls)

10/29/85

220. NOTICE of filing by defendant Secretary of the United States Department of Health and Human Services; declaration of Jo Ann Gasper; attachments A through C. (hls)

2/ 6/86

222. DEPOSITION of Shula Hurley taken 1/27/84; attachment. (kc)

224. DEPOSITION of Alice Rusbar taken 1/27/84; attachment. (kc)

225. DEPOSITION of Jane Leung taken 1/17/84 on behalf of plaintiffs; exhibits. (kc)

2/20/86

226. NOTICE by defendant of filing the January 27, 1986 decision of the United States

Supreme Court in *Witters v. Washington Department of Services for the Blind*; Attachment. (fs)

3/ 3/86

227. RESPONSE by plaintiffs to defendant's notice of filing. (hls)

3/ 6/86

228. DEPOSITION of Janet L. Hirsch taken 3/14/84; attachments. (hls)

229. DEPOSITION of Nancy Bouchard-Fincke taken 5/7/84. (hls)

230. DEPOSITION of Mercedes Wilson taken 1/27/84; attachments (hls)

231. DEPOSITION of Mary Conroy taken 2/6/84; attachments. (hls)

3/10/86

233. RESPONSE by defendant to plaintiffs' filing concerning the Witters decisions. (hls)

4/ 2/86

234. MOTION by plaintiffs to supplement the record; affirmation; notice; exhibit (supplement to the record). (kc)

4/15/86

235. MEMORANDUM of defendants in partial opposition to plaintiffs' motion for leave to supplement the record; attachment (bm)

4/21/86

236. NOTICE by defendant Dr. Otis R. Bowen, Jr. of filing the attached March 25th, 1986 decision of the Supreme Court. (kc)

5/ 6/86

237. NOTICE by plaintiffs of filing their response to notice of defendant's notice of filing dated 4/21/86; response. (fs)

5/12/86

238. ORDER directing that plaintiffs be allowed to amend the record to plaintiffs' motion for summary judgment to include letters from Mercedes Wilson to Pope John Paul II, John Cardinal Knox, Charles Costello and the letter from Charles Costello to Mercedes Wilson. (N) (Signed 5/6/86). RICHEY, J. (mew)

5/14/86

239. SUPPLEMENT to defendants' memorandum in partial opposition to plaintiffs' motion for leave to supplement the record.(mew)

5/30/86

240. MEMORANDUM of defendants in response to plaintiffs' supplementation of the record; declaration of Mercedes Arzu Wilson. (mf)

7/21/86

241. NOTICE of filing by defendant Dr. Otis R. Bowen, Jr.; attachment. (hls)

7/29/86

242. RESPONSE by plaintiffs to defendant's notice of filing date July 21, 1986; attachment. (je)

9/ 4/86

243. NOTICE by plaintiffs of filing and response to defendant's reply in support of its 7/21/86 notice of filing; attachment. (je)

9/16/86

244. RESPONSE by defendant to plaintiffs' 9/5/86 notice of filing. (je)

9/22/86

245. RESPONSE (supplement) by defendant to plaintiffs' 9/5/86 notice of filing; attachment. (je)

4/20/87

246. MEMORANDUM Opinion filed 4/15/87. (cp)

247. ORDER filed 4/15/87 granting plaintiffs' motion for a declaratory judgment only as applied to religious organizations involved in carrying out the programs and purposes of the Act; granting plaintiffs' motion for an injunction prohibiting all funding only as it pertains to religious organizations under the Adolescent Family Life Act; denying defendants and defendants-intervenors' motions for summary judgment; directing parties to submit additional briefs on certain issues within thirty days and replies within ten business days thereafter. (N) RICHEY, J. (cp)

4/24/87

248. MOTION by defendant HHS for stay pending final judgment, or, in the alternative, pending appeal and motion to shorten time for responses; exhibits (10). (je)

4/28/87

249. NOTICE by defendants of filing of affidavit of Carol A. Bervera in support of motion for stay; attachment. (je)

4/29/87

251. MOTION by federal defendants to alter or amend judgment. (je)

4/30/87

252. MOTION by intervenors to adopt federal defendants' motion for stay pending final judgment, or, in the alternative, pending appeal and motion to shorten time for responses. (je)

5/ 4/87

253. RESPONSE by plaintiffs in opposition to defendants' motion for stay pending final judgment or in the alternative pending trial; attachment. (je)

5/ 6/87

254. REPLY by defendants to plaintiffs' opposition to motion for stay. (je)

5/ 8/87

255. ORDER directing defendants to submit certain information concerning AFLA grantees and subgrantees by 5/12/87. (N) RICHEY, J. (je)

256. NOTICE by defendants of filing of affidavit of Carol Bervera; attachment. (je)

5/13/87

260. RESPONSE filed 5/12/87 by federal defendants to Court's 5/8/87 Order for submission of information relevant to defendants' 4/24/87 stay motion; declaration; exhibits (6). (je)

5/14/87

261. NOTICE OF FILING filed 5/13/87 by defendants of supplemental declarations; attachments (2); exhibits (3). (je)

262. RESPONSE by plaintiffs to defendants' motion to alter or amend the judgment; exhibit. (je)

5/15/87

263. NOTICE OF FILING by defendants of second supplemental declaration of Jo Ann Gasper; attachment; exhibits (3). (je)

5/18/87

267. NOTICE OF APPEAL filed 5/15/87 by defendants to the U.S. Supreme Court from order entered 4/20/87. No Fee Paid US government. (je)

5/20/87

268. MEMORANDUM by *Amicus Curiae* U.S. Catholic regarding issue of severability. (je)

5/21/87

270. RESPONSE by plaintiffs to Court's Order of 4/15/87 in opposition to severance and in favor of declaring the Adolescent Family Life Act unconstitutional in its entirety; attachment. (je)

271. MEMORANDUM filed 5/20/87 by defendants addressing the severability of 42 U.S.C. § 300z-5(a)(21)(B). (je)

272. ORDER filed 5/20/87 directing parties to submit concise briefs on certain concerns of the Court within 5 days of this order and replies 10 days thereafter. (N) RICHEY, J. (je)

274. BRIEF by defendants-intervenors regarding severability of religious organizations language under the Adolescent Family Life Act. (je)

5/22/87

276. RESPONSE filed 5/21/87 by federal defendants to Court's 5/20/87 Order. (je)

277. NOTICE OF FILING by defendants of declarations of Jo Ann Gasper and Carol Bervera; attachments (2). (je)

278. MEMORANDUM (post-hearing) by *Amicus Curiae* U.S. Catholic Conference in support of motion for stay. (je)

5/26/87

281. ORDER filed 5/22/87 staying the Court's Order of 4/15/87 only to the extent that it enjoins funding of current AFLA grantees that are religious organizations; directing that this stay shall only be effective to 9/30/87. (N) RICHEY, J. (je)

5/28/87

283. RESPONSE by intervenors-defendants to Court's Order of 5/20/87. (je)

6/1/67

284. RESPONSE filed 5/29/87 by plaintiffs to the Court's 5/20/87 Order; attachment. (je)

6/ 4/87

285. REPLY by defendants addressing the severability of 42 U.S.C. § 300z-5(a)(21)(B); affidavits (4); attachments (6). (je)

6/ 5/87

286. TRANSCRIPT OF PROCEEDINGS on 5/7/87; pages 1 through 57; (Rep. G. H. Horning). (je)

287. REPLY filed 6/3/87 by intervenors-defendants on the issue of severability. (je)

6/15/87

288. NOTICE OF APPEAL by defendants-intervenors United Families of America from order entered 4/20/87. $5.00 filing fee paid. (to Supreme Court). (je)

7/ 6/87

289. MOTION by defendant Bowen for stay pending appeal and to shorten time for and supporting memorandum. (je)

7/ 9/87

291. OPPOSITION by plaintiffs to defendants' motion for stay pending appeal.

8/ 4/87

296. ORDER filed 7/31/87 denying defendants' motion for a stay pending appeal. (N) RICHEY, J. (je)

8/12/87

297 ORDER from Supreme Court of the United States staying case pending timely docketing of an appeal; attachment. (je)

8/13/87

298. NOTICE OF FILING of proposed order; attachment. (je)

8/17/87

299. ORDER filed 8/13/87 severing the term "religious organization" from the AFLA in all places that it appears; denying defendants' Rule 59(e) motion; dismissing case from dockets of the Court. (N) RICHEY, J. (je)

8/20/87

300. NOTICE OF FILING by defendant Bowen of notice of appeal to the Supreme Court of the United States from the final judgment of

U.S.D.C. for the District of Columbia entered 8/17/87; attachment. (je)

8/26/87

301. NOTICE OF FILING by plaintiffs Chan Kendrick, Reverend Robert E. Vaughn, Reverend Lawrence W. Buxton, Dr. Emmett W. Cocke, Jr., Shirley Pedler, Reverend Joyce Armstrong and John Roberts of notice of cross-appeal to the Supreme Court of the United States from the final judgment of U.S.D.C. for the District of Columbia entered 8/17/87; attachment. (je)

9/11/87

302. NOTICE OF APPEAL by defendant-intervenor United Families of America to the Supreme Court from Order entered 8/17/87. (je)

9/17/87

303. TRANSCRIPT OF PROCEEDINGS on 8/11/87; pages 1 through 43; (Rep. G. Horning). (je)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 83-3175

CHAN KENDRICK
2607 Floyd Avenue
Richmond, Virginia 23221
(804) 355-5127;

REVEREND ROBERT E. VAUGHN
3512 Old Dominion Boulevard
Alexandria, Virginia 22305
(703) 836-2406;

REVEREND LAWRENCE W. BUXTON
Floris Church
2629 Centerville Road
Herndon, Virginia 22071
(703) 437-7602;

DR. EMMETT W. COCKE, JR.
Mt. Vernon United Methodist Church
2006 Belview Boulevard
Alexandria, Virginia 22307
(703) 765-1100;

SHIRLEY PEDLER
687 Second Avenue (No. 7)
Salt Lake City, Utah 84103
(801) 521-9289;

JOYCE ARMSTRONG
6340 Alamo
Clayton, Missouri 63105
(314) 727-1298;

THE AMERICAN JEWISH CONGRESS
15 East 84th Street
New York, New York 10028
(212) 879-4500,

JOHN ROBERTS
321 Huron Avenue
Cambridge, Massachusetts 02138
(617) 354-2654;

and

REVEREND HOMER A. GODDARD
137 Concord Road
Sudbury, Massachusetts 01776
(617) 443-9245 PLAINTIFFS,

v.

MARGARET HECKLER
Secretary of the Department of Health and Human Services
200 Independence Avenue, S.W.
Washington, D.C. 20201
(202) 245-7000;

and

MARGORY MECKLENBURG
Deputy Assistant Secretary for Population Affairs
and Director of the Office of Adolescent Pregnancy Programs
Reporters Building, Room 612
300 Seventh Street, S.W.
Washington, D.C. 20201
(202) 472-9093 DEFENDANTS.

AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF (ESTABLISHMENT OF RELIGION)

I.
PRELIMINARY STATEMENT

1. This is an action brought by taxpayers, clergymembers, and a religious and charitable organization for declaratory and injunctive relief against the Adolescent Family Life Act ("The Act"), 42 U.S.C. Sections 300z–300z(10) (1981), and against the Act as applied, which violate the religion clauses of the First Amendment to the Constitution of the United States.

2. The Adolescent Family Life Act, popularly known as the "Chastity Act" (attached hereto as Exhibit A), authorizes the Department of Health and Human Services (DHHS) to make grants for demonstration projects which will "promote self discipline and other prudent approaches to the problem of adolescent premarital sexual relations," 42 U.S.C. § 300z(b)(1). Under the Act, hundreds of thousands of federal tax dollars are being paid directly and indirectly to religious institutions which use the funds to promote government-approved religious doctrines on sex and family life values.

3. The Act promotes and subsidizes religion and authorizes the use of religious indoctrination as a means of opposing premarital sex, abortion, and birth control for teenagers. The Act specifically requires grantees to involve religious organizations in demonstration projects and encourages religious groups to become direct grant recipients. Accordingly, grants have been made to religious organizations in clear violation of the religion clauses of the First Amendment.

4. Furthermore, the Act authorizes grants only to programs or projects which do not counsel on, refer for (with a limited exception), provide, or advocate, promote, or

encourage abortion. 42 U.S.C. § 300z-10(a). Because of these abortion restrictions, the only religious groups which receive funding are those whose religious doctrines on abortion and sexuality coincide with the positions promoted by the Act. Thus, the Act also discriminates among religions, because religious organizations which hold conflicting religious doctrines are in effect, disqualified from receiving funds under the Act.

5. Plaintiffs seek a declaration that the Act is invalid under the First Amendment, and that certain grants made by defendants directly or indirectly to sectarian religious groups which use the funds to promote religious doctrine are invalid. Plaintiffs seek an injunction against such unconstitutional grantmaking.

II.
JURISDICTION

6. This court has jurisdiction pursuant to 28 U.S.C. Section 1331, for causes of action arising under the First Amendment to the Constitution of the United States.

III.
PLAINTIFFS

7. Plaintiff Chan Kendrick is a resident of Richmond, Virginia. He is and sues as a federal taxpayer.

8. Plaintiff Reverend Robert E. Vaughn, a resident of Alexandria, Virginia, is a federal taxpayer and a member of the United Methodist clergy who has devoted his life to the United Methodist community and beliefs. The Adolescent Family Life Act's position on abortion and its promotion of certain religious doctrines involving sexuality, abortion, and the family are contrary to many of the guiding principles of the United Methodist religion, including separation of church and state. Reverend Vaughn's

beliefs and devotion to the United Methodist community and his efforts to communicate his beliefs are being denigrated by the funding and promotion by the government of particular churches and of conflicting religious ideologies. Reverend Vaughn sues as a religious person in his community and as a federal taxpayer.

9. Plaintiff Reverend Lawrence W. Buxton, a resident of Herndon, Virginia, is a federal taxpayer and a member of the United Methodist clergy who has devoted his life to the United Methodist community and beliefs. The Adolescent Family Life Act's position on abortion and its promotion of certain religious doctrines involving sexuality, abortion, and the family are contrary to many of the guiding principles of the United Methodist religion, including separation of church and state. Reverend Buxton's beliefs and devotion to the United Methodist community and his efforts to communicate his beliefs are being denigrated by the funding and promotion by the government of particular churches and of conflicting religious ideologies. Reverend Buxton sues as a religious person in his community and as a federal taxpayer.

10. Plaintiff Dr. Emmett W. Cocke, Jr., a resident of Alexandria, Virginia, is a federal taxpayer and a member of the United Methodist clergy who has devoted his life to the United Methodist community and beliefs. The Adolescent Family Life Act's position on abortion and its promotion of certain religious doctrines involving sexuality, abortion, and the family are contrary to many of the guiding principles of the United Methodist religion, including separation of church and state. Reverend Cocke's beliefs and devotion to the United Methodist community and his efforts to communicate his beliefs are being denigrated by the funding and promotion by the government of particular churches and of conflicting religious ideologies. Reverend Cocke sues as a religious person in his community and as a federal taxpayer.

11. Plaintiff American Jewish Congress, founded in 1918, is a national membership organization of American Jews serving all fifty states, with its national headquarters in New York City, New York. The American Jewish Congress asserts the interests of its membership as individuals, and that of the Jewish community in general, in the separation of church and state, as secured by the Establishment Clause of the First Amendment to the Constitution of the United States. It likewise asserts the religious beliefs of its members. Certain values and positions promoted by the Act are contrary to the Jewish religion, making Jewish organizations ineligible for funding. The religious beliefs of the membership of the American Jewish Congress and the Jewish religion are denigrated and disadvantaged by the government's endorsement of religions with differing doctrines. It sues on its own behalf and on behalf of its members, who are federal taxpayers.

12. Plaintiff Shirley Pedler is a resident of Salt Lake City, Utah. She is and sues as a federal taxpayer.

13. Plaintiff Joyce Armstrong is a resident of St. Louis, Missouri. She is and sues as a federal taxpayer.

14. Plaintiff John Roberts is a resident of Cambridge, Massachusetts. He is and sues as a federal taxpayer.

15. Plaintiff Reverend Homer A. Goddard, a resident of Sudbury, Massachusetts, is a federal taxpayer and a member of the Unitarian Universalist clergy who has devoted his life to the Unitarian Universalist community and beliefs. The Adolescent Family Life Act's position on abortion and its promotion of certain religious doctrines involving sexuality, abortion, and the family are contrary to many of the guiding principles of the Unitarian religion, including separation of church and state. The Unitarian Universalist Association has developed and sponsored a sex education course which, consistent with Unitarian Universalist principles, provides full informa-

tion about abortion and contraception. The Association, also in keeping with its principles of separation of church and state, refuses to accept or solicit government funding for its sex education program. A Unitarian Unversalist Association sex education course is taught at Reverend Goddard's church. Reverend Goddard's beliefs and devotion to the Unitarian Universalist community and his efforts to communicate his beliefs are being denigrated by the funding and promotion of conflicting religious ideologies. Reverend Goddard sues as a religious person in his community and as a federal taxpayer.

IV.
DEFENDANTS

16. Defendant Margaret Heckler is Secretary of the Department of Health and Human Services (DHHS) and, pursuant to 42 U.S.C. Section 300z-2, is authorized to make grants to demonstration projects pursuant to the Act.

17. Defendant Marjory Mecklenburg, Deputy Assistant Secretary for Population Affairs and Director of the Office of Adolescent Pregnancy Programs, administers the Act under the supervision of Defendant Heckler.

V.
FACTUAL ALLEGATIONS

18. The Adolescent Family Life Act constitutes an exercise of the taxing and spending power of Congress under Article 1, Section 8, of the United States Constitution.

19. The Act, signed into law in 1981, repealed and replaced the Adolescent Health Services and Pregnancy Prevention and Care Act of 1978 (Public Law 95-626). The 1981 Act made significant changes and additions to the 1978 Act, including requiring the use of religious organizations to achieve its goals, prohibiting abortion counseling and referrals (with a limited exception), and requiring parental notification and permission for any

minor requesting necessary services, except under certain limited circumstances.

20. The purposes of the Act are to discourage adolescent premarital sexual relations, 42 U.S.C. § 300z(b)(1); encourage teenagers to continue their pregnancies and choose adoption, 42 U.S.C. §§ 300z(a)(6)(A), 300z(b)(2), (regardless of the consequences for the teenager's economic potential, health, and life); and to provide comprehensive care services (excluding abortion-related services) for pregnant teenagers, 42 U.S.C. §§ 300z(b)(3), 300z-1 (a)(7), 300z-1(a)(4).

21. Under the Act, 42 U.S.C. § 300z-2, Defendants are authorized to make grants to eligible grant recipients for demonstration projects which the Secretary determines will help communities provide appropriate "care" and/or "prevention" services. Care services are "necessary services for the provision of care to pregnant adolescents and adolescent parents." 42 U.S.C. §§ 300z-1(a)(7), 300z-1(a)(4). Prevention services are "necessary services to prevent adolescent sexual relations." 42 U.S.C. § 300z-1(a)(8).

22. Grantees who counsel pregnant adolescents encourage childbirth by deliberately omitting abortion from the options presented. Some of the grants made in accordance with the provisions of the Act directly interfere with the ability of a pregnant teenager to make an informed decision about whether to carry her pregnancy to term or to have an abortion by depriving the teenager of information about this option, while providing her with information about other options. Teenagers incur manifold additional risks to their lives and health by continuing their pregnancies as opposed to choosing abortion, yet are precluded by the Act from receiving this information.

23. Under the Act, the Secretary is authorized to make grants directly and indirectly to religious organizations. According to the Act, religious organizations are among those groups best suited to approach the problems of adolescent premarital sexual relations, pregnancy and par-

enthood, 42 U.S.C. §§ 300z(a)(8)(B), 300z(a)(10)(C); and therefore demonstration projects funded under the Act are required to involve religious organizations in the provision of services, 42 U.S.C. §§ 300z-2(a), 300z-5(a)(21)(b). The legislative history authorizes grants to religious organizations:

> . . . provisions for the involvement of religious organizations do not violate the constitutional separation between church and state. Recognizing the limitations of government in dealing with a problem that has complex moral and social dimensions, the committee believes that promoting the involvement of religious organizations in the solution to these problems is neither inappropriate or illegal . . . Religious affiliation is not a criterion for selection as a grantee under the adolescent family life program, but any such grants made by the Secretary would be a simple recognition that nonprofit religious organizations have a role to play in the provisions of services to adolescents. S. Rep. No. 97-161, 97th Congress, 1st Sess. 15, 16 (1981).

The Act contains no provision to insure that the religious organizations will use the funds only for secular purposes.

24. Because of the Act's explicit provision mandating religious involvement in the grant programs, combined with its restriction limiting grants only to those projects or programs which do not advocate, promote, encourage, or refer pregnant teenagers for, abortion, Sections 300z-10(a), the government favors, subsidizes, and advances some religions while rendering others ineligible for funds, comparatively disadvantaging their efforts to promote their religious beliefs.

25. Defendants have made grants which constitute direct aid to parochial schools, as well as direct and indirect grants to religious institutions which use the funding

and the imprimatur of government approval to advance their religious doctrines. These grants include:

A. Catholic Charities of the Diocese of Arlington, Inc.

26. Defendants awarded $75,000 in 1982 and $75,000 in 1983 to Catholic Charities of the Diocese of Arlington, Virginia, for a prevention program entitled "Family Centered Sex Education: A Preventive Program." Catholic Charities is a private, nonprofit corporation organized pursuant to the laws of the Commonwealth of Virginia, designed to carry out welfare activities which are consistent with the Code of Canon Law of the Roman Catholic Church. Catholic Charities' service area covers all of Northern Virginia including Arlington, Alexandria, and Herndon.

27. The Catholic Charities program is given solely in Catholic parochial schools and in Catholic religious education classes using church facilities. The program is designed solely for the benefit of Catholic adolescents. The grant to Catholic Charities directly aids and subsidizes parochial schools in their ongoing teaching of religious doctrine.

28. Upon information and belief, the Catholic Charities program teaches Catholic doctrine and promotes the Catholic religious position on sex and family life. The manuals which the grantee uses explicitly teach Catholic doctrine on sex and family life, including the position that abortion is a sin and immoral. One of the manuals, *Reverence for Life and Family – a Catechesis in Sexuality*, states that "the Life and Family program exists for the sole purpose of sharing the Christian message" and explains that one goal of the catechesis is "training in chastity in accord with the teaching of Christ and the Church."

B. SeMo Association of Public Health Administrators, Inc.

29. In 1982 and 1983, grants of $100,000 (one hundred thousand dollars) were given to SeMo Association of Public Health Administrators, Inc. ("SeMo"), of Bootheel, Missouri, for a project entitled "Bootheel Adolescent Family Life Project." SeMo is a private, nonprofit corporation, organized as an umbrella health services network.

30. Upon information and belief, SeMo is using the federal funds it has received pursuant to the Adolescent Family Life Act to train and encourage clergymembers and religious organizations to promote government-approved religious doctrine on sex and family life values. Its application states:

> One of the most obvious tools which can be used to change the attitude of young people toward sexual activity has been avoided for many years. That tool is the use of the religious foundation as a support for sexuality education. Most major religions see sexuality as being of God and can therefore effectively and in good conscience utilize appropriate educational materials to help young people to learn about their bodies and the values that relate to sexual functioning in a context that is consistent with the tenets of their particular faith.

C. Brigham Young University

31. The Secretary made a grant to Brigham Young University ("BYU") in Provo, Utah, for $177,437 in 1982 and a grant for $185,423 in 1983 for a "prevention" program. BYU is a private, nonprofit university created, controlled, and operated by the the Church of Jesus Christ of Latter-Day Saints (the Mormon church). BYU is a pervasively sectarian religious institution.

32. The BYU prevention program is designed for 9th, 10th, and 11th grade students and their families in public schools in Utah, California, and New Mexico.

33. Upon information and belief, the BYU program is promoting Mormon and other Christian religious doctrine in tax-established and tax-supported public school systems.

D. St. Margaret's Hospital

34. Grants of $446,806 in 1982 and $235,000 in 1983 were given to St. Margaret's Hospital, Dorchester, Massachusetts, for a joint prevention and care services program. St. Margaret's Hospital is a private, nonprofit hospital, the primary focus of which is the care of women and children in accordance with the teachings of the Roman Catholic Church.

35. Upon information and belief, St. Margaret's is using the money to promote Catholic doctrine on sex and family life. It states in its application for funds:

> Teenage extramarital pregnancies poignantly illustrate a great challenge to the family—the separation of reproduction from marriage. If a breakdown in family life is occurring in contemporary times, this may well emanate from a widespread ignorance of the rules, attitudes, and commandments related to both Jewish and Christian home life and to the sexual relationship. Families are familiar with the "ascetic ideal"; they have come to know the "hedonic ideal" inherent in the secularism of today; but they remain sadly ignorant of the ideal of holiness inherent in the basic tenets of Judeo-Christian beliefs.
>
> The Bishops of the United States have designated the 1980's as the *Decade of the Family*. Pope John Paul II has stated, "The pastoral intervention of the church in support of the family is a matter or urgency."

He has also emphasized, "Every effort should be made to strengthen and develop pastoral care for the family which should be treated as a real matter of priority."

36. Upon information and belief, St. Margaret's uses the grant money to teach courses in parochial schools, to teach religious ministers to promote government-supported religious views on sex and family life, and to reinforce the role of religion as taught at St. Margaret's.

E. Saint Ann's Infant and Maternity Home

37. Defendants awarded $200,000 in 1982 and 235,000 in 1983 to Saint Ann's Infant and Maternity Home in Hyattsville, Maryland, for a care project. Saint Ann's is a nonprofit corporation within the Roman Catholic Archdiocese of Washington, D.C. Saint Ann's subcontracts with the Center for Life of Providence Hospital of Washington, D.C., which conducts the Family Life education component of the Saint Ann's care project.

38. Upon information and belief the Center for Life promotes the Catholic religious position on sex and family life. The Center's "Adolescent Fertility Awareness Program," adapted for use under the Adolescent Family Life Act, includes in its instructional kit a handout for parent participants entitled, "Sexuality: God's Gift," by the Most Reverend Francis T. Mugavero, published by the Archdiocese of Brooklyn, New York. This Pastoral Letter states:

> Sexuality is one of God's greatest gifts to man and woman . . . Theology teaches that relationship—the gift of oneself to another—is at the very heart of God. The Father and Son give themselves totally to one another and the mutuality of their total response in love is the Holy Spirit, binding them together. We honor God and become more like Him when we create

> in our own lives the loving, other-centered relationships which at the same time give us such human satisfaction and personal fulfillment.

The letter also states that:

> We wish to encourage people to go continually beyond themselves in order to achieve greater sexual maturity and urge them to find peace and strength in a full sacramental life with the Christ who loves them.

39. Upon information and belief, Saint Ann's and the Center for Life present distorted and inaccurate information to further their religious positions. While the program offers extensive information on natural family planning, a contraceptive method consistent with Catholic religious doctrine, it offers inaccurate and misleading information about all other methods. Its application states that the program will discuss the "medical hazards of common contraceptive methods" and "the inadvisability of contraceptive use among adolescents" and will "provide information on the safety and efficacy of contraceptive use which will discourage contraceptive usage among adolescent participants."

F. Family of the Americas Foundation, Inc.

40. In 1983, defendants made a grant of $350,000 to Family of the Americas Foundation, Inc., of Covington, Louisiana, for a prevention project entitled "Fertility Appreciation for Families." Family of the Americas Foundation, Inc. (formerly World Organization Ovulation Method—Billings, USA ("WOOMB")) was incorporated as a nonprofit organization in the State of Missouri in 1977. The organization's broad purpose, as stated in the articles of incorporation, is to promote family unity by disseminating accurate information about the Billings Method of natural birth regulation throughout the United States.

41. The Fertility Appreciation for Families program will be administered and presented at five (5) sites, through five (5) organizations. These organizations are: South Texas Family Planning and Health Corporation of Corpus Christi, Texas; St. Joseph Hospital Natural Family Planning Center of Memphis, Tennessee; Billings Ovulation Method Centers of Lousiana, New Orleans, Louisiana; Family Life Bureau of St. Cloud, Minnesota; and Natural Family Planning Center of St Francis Hospital of Wichita, Inc., Wichita, Kansas.

42. Upon information and belief, these site organizations use the funding to promote religious views on sex, abortion, and family life. For example, the Natural Family Planning Life Bureau of St. Cloud, Minnesota, in the Diocese of St. Cloud, states in its advertisement that, "The appeal for a natural method of child spacing reflects not only a desire to follow the teaching of the Church and *Humanae Vitae*, but also the concerns of couples for some of the following reasons . . ." The advertisement begins by observing that:

> October 1982 marked the tenth anniversary of the Natural Family Planning (NFP) program. The program, which began in order to provide a morally acceptable method of child spacing for the Catholic community, has grown to serve a greater portion of the Christian community within the sixteen-county area served by the Diocese of St. Cloud.
>
> In *Familiaris Consortio*, Pope John Paul II wrote:
>
> "The Church cannot fail to call with renewed vigor on the responsibility of all doctors, experts, marriage counselor, teachers, and married couples who can actually help married people to live their love with respect for the structure and . . . of the conjugal act which expresses that love. This implies a broader, more decisive, and more systematic effort to make the natural methods of regulating fertility known, respected, and applied."

43. Similarly, the Natural Family Planning Center of Wichita's program—the Adolescent Development and Enrichment Program—promotes religious doctrine. A pilot project of this program, which was hosted by the Reverend C.J. Taylor, Pastor, and held at and under the auspices of the Pentecostal Church of God in Christ, elicited this response from an adolescent who participated in the program:

> At first, I really wasn't sure how I'd feel [about this kind of program] because the guys these days degrade *womanity*, but yet sometimes we degrade ourselves. The slides were beautiful and I do consider my body a gift of God.

The first session of the program is entitled, "Sexuality—What Is It? & The Gift of Our Bodies."

G. Search Institute

44. In 1983, Defendants awarded $318,527 to Search Institute of Minneapolis, Minnesota, for a prevention program entitled "Life and Family National Demonstration Project." Search Institute is a private, nonprofit research corporation.

45. Upon information and belief, the Search Institute will use the federal funds to promote religion and religious values on sex and family life. According to its application, "The Life and Family National Demonstration Project will offer an innovative alternative to sex education programs with an emphasis on family, church, and community involvement." The application also states:

> Based upon the cultural values which uphold marriage and family, fidelity and commitment, sexual restraint, ethical and moral norms, the common welfare, and the role of faith in American life, this program presents sexuality in the context of values, respecting the limits appropriate to public education and the rightful role of family and church . . . .

The application also states that, "The Life and Family Project will also build upon the success of the Reverence for Life and Family curriculum for parents and teens developed by the Roman Catholic Church . . . " and that "this model will provide the foundation from which the proposed program is being adapted." This curriculum was co-authored by John E. Forliti, D. Min., Director of Search Institute, and is an explicitly religious program. According to the application, the Search Institute "has embarked on the publishing and production of an Interdenominational edition . . ."

46. Upon information and belief, the program promotes religion and religious values through its "value-based" sex education program. The "value-based" program seeks,

> . . . in addition to knowledge transmission, to impart to youth a value system to restrain or decrease sexual activity. Unlike *knowledge-based* programs, *valued-based* programs represent an "up front" point of view, weaving together some combination of ethics, cultural norms and mores, theology, and cost benefit analysis to justify self-restraint.

47. Plaintiff clergymembers and religious organization are directly injured by this support of religion and of particular religious doctrines. The government's official support of certain doctrines diminishes Plaintiff clergymembers' positions in the community, encumbers their professional calling in life, places the imprimatur of the government behind competing religions, and disadvantages their ability to communicate their religious message and practice their religions.

48. Plaintiff taxpayers suffer injury as a result of the unconstitutional use of Federal tax dollars to support and promote religion.

FIRST CAUSE OF ACTION

49. The Adolescent Family Life Act violates the religion clauses of the First Amendment to the Constitution.

SECOND CAUSE OF ACTION

50. The Act as applied, including grants to Catholic Charities of Arlington, Virginia, SeMo of Bootheel, Missouri, St. Margaret's of Dorchester, Massachusetts, Brigham Young University of Provo, Utah, Saint Ann's Infant and Maternity Home of Hyattsville, Maryland, Family of the Americas, Inc., of Covington, Louisiana, and Search Institute, of Minneapolis, Minnesota, is in violation of the religion clauses of the First Amendment to the Constitution.

PRAYER FOR RELIEF

WHEREFORE Plaintiffs respectfully pray that this Court:

1. Enter an order declaring that the Act, and the Act as applied, are unconstitutional, null, void and unenforceable;

2. Enter an order declaring that the grants to; (a) Catholic Charities of the Diocese of Arlington, Inc., (b) SeMo Association of Public Health Administrators, Inc., (c) Brigham Young University, (d) St. Margaret's of Dorchester, Massachusetts, (e) Saint Ann's Infant and Maternity Home of Hyattsville, Maryland, (f) Family of the Americas, Inc., Covington, Louisiana, and (g) Search Institute, of Minneapolis, Minnesota, are unconstitutional, null, void and unenforceable; and enjoin any future money and apportionment of funds from being given to these projects as now constituted;

3. Permanently enjoin defendants and their agents, representatives, successors, and those acting in concert with them, from awarding grants, denying grants, or disbursing funds in violation of the establishment clause of the First Amendment.

4. Award plaintiffs costs and reasonable attorney's fees; and

5. Grant such other relief as it may deem just and proper.

Respectfully submitted,

/s/ _____
BRUCE J. ENNIS
Ennis, Friedman, Bersoff, and Ewing
1200 Seventeenth Street, N.W.
Washington, D.C. 20036
(202) 775-8100

/s/ _____
JANET BENSHOOF
SUZANNE LYNN
NAN D. HUNTER
RANDEE PAVALOW
American Civil Liberties Union Foundation*
132 West 43rd Street
New York, New York, 10036
(212) 944-9800

ART SPITZER
ACLU of the National Capitol Area
Suite 301
600 Pennsylvania Ave. S.E.
Washington, D.C. 20036
(202) 544-1076

*LYNN M. PALTROW, Law Graduate, on the Complaint.
American Civil Liberties Union Foundation

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 83-3175

CHAN KENDRICK, ET AL., PLAINTIFFS,

v.

MARGARET HECKLER, SECRETARY OF THE DEPARTMENT OF HEALTH AND HUMAN SERVICES, ET AL., DEFENDANTS.

ANSWER TO AMENDED COMPLAINT

Defendants Margaret M. Heckler, Secretary of the United States Department of Health and Human Services ("HHS"), and Marjory Mecklenburg, Deputy Assistant Secretary for Population Affairs and Director of the Office of Adolescent Pregnancy Programs, HHS,[1] by their undersigned counsel, answer plaintiffs' December 23, 1983 amended complaint as follows:

FIRST DEFENSE

The amended complaint fails to state claims against defendants upon which relief may be granted.

SECOND DEFENSE

The Court lacks jurisdiction over this action.

THIRD DEFENSE

Plaintiffs lack standing to maintain this action.

[1] On January 4, 1984, this Court ruled that the action be maintained against only the head of the agency, defendant Heckler. As no order yet has been entered, both defendants remain listed herein for purpose of formality.

FOURTH DEFENSE

The amended complaint must be dismissed for plaintiffs' failure to join indispensable parties—the recipients of the HHS grants challenged as unlawful in this litigation.

FIFTH DEFENSE

Answering the specific numbered paragraphs of plaintiffs' amended complaint, defendants state:

1. Paragraph one of the amended complaint constitutes plaintiffs' characterization of this action, to which no response is required; if a response is required, said allegations are denied.

2. The first sentence of paragraph two of the amended complaint describes the provisions of the Adolescent Family Life Act ("the Act"), the provisions of which statute speak for themselves. Defendants deny the allegations of the second sentence of said paragraph.

3. Defendants deny the allegations of the first and third sentences of paragraph three of the amended complaint. The second sentence of said paragraph describes the provisions of the Act, the provisions of which speak for themselves.

4. The first sentence of paragraph four of the amended complaint describes the Act, the provisions of which speak for themselves. Defendants are without sufficient knowledge or information to form a belief as to the truth or falsity of the allegations of the second sentence of this paragraph. Defendants deny the allegations of the third sentence of said paragraph.

5. Paragraph five of the amended complaint constitutes plaintiffs' characterization of this action, to which no response is required; if a response is required, said allegations are denied.

6. Defendants deny the allegations of paragraph six of the amended complaint.

7. Defendants are without sufficient knowledge or information to form a belief as to the truth or falsity of the allegations of paragraph seven of the amended complaint.

8. Defendants are without sufficient knowledge or information to form a belief as to the truth or falsity of the allegations of the first sentence of paragraph eight of the amended complaint. Defendants deny the allegations of the second and third sentences of said paragraph. The fourth sentence of said paragraph constitutes plaintiffs' characterization of this action, to which no response is required; if a response is required, said allegations are denied.

9. Defendants are without sufficient knowledge or information to form a belief as to the truth or falsity of the allegations of the first sentence of paragraph nine of the amended complaint. Defendants deny the allegations of the second and third sentences of said paragraph. The fourth sentence of said paragraph constitutes plaintiffs' characterization of this action, to which no response is required; if a response is required, said allegations are denied.

10. Defendants are without sufficient knowledge or information to form a belief as to the truth or falsity of the allegations of the first sentence of paragraph ten of the amended complaint. Defendants deny the allegations of the second and third sentences of said paragraph. The fourth sentence of said paragraph constitutes plaintiffs' characterization of this action, to which no response is required; if a response is required, said allegations are denied.

11. Defendants are without sufficient knowledge or information to form a belief as to the truth or falsity of the allegations of the first three sentences of paragraph 11 of the amended complaint. Defendants deny the allegations of the fourth and fifth sentences of said paragraph. The last sentence of said paragraph constitutes plaintiffs' characterization of this action, to which no response is required; if a response is required, said allegations are denied.

12. Defendants are without sufficient knowledge or information to form a belief as to the truth or falsity of the allegations of the first and second sentences of paragraph 12 of the amended complaint. The second sentence of said paragraph also constitutes plaintiffs' characterization of this action, to which no response is required; if a response is required, said allegations are denied.

13. Defendants are without sufficient knowledge or information to form a belief as to the truth or falsity of the allegations of the first and second sentences of paragraph 13 of the amended complaint. The second sentence of said paragraph also constitutes plaintiffs' characterization of this action, to which no response is required; if a response is required, said allegations are denied.

14. Defendants are without sufficient knowledge or information to form a belief as to the truth or falsity of the allegations of the first and second sentences of paragraph 14 of the amended complaint. The second sentence of said paragraph also constitutes plaintiffs' characterization of this action, to which no response is required; if a response is required, said allegations are denied.

15. Defendants are without sufficient knowledge or information to form a belief as to the truth of falsity of the allegations of the first, third, fourth, and fifth sentences of paragraph 15 of the amended complaint. Defendants deny the allegations of the second and sixth sentences of said paragraph. The final sentence of said paragraph constitutes plaintiffs' characterization of this action, to which no response is required; if a response is required, said allegations are denied.

16. Defendants admit the allegations of paragraph 16 of the amended complaint.

17. Defendants admit the allegations of paragraph 17 of the amended complaint, noting, however, that this Court has ruled that the named defendant be dismissed as a party defendant hereto.

18. Paragraph 18 of the amended complaint constitutes plaintiffs' characterization of the Act, the provisions of which speak for themselves.

19. Paragraph 19 of the amended complaint constitutes plaintiffs' characterization of the Act, the provisions of which speak for themselves.

20. Paragraph 20 of the amended complaint constitutes plaintiffs' characterization of the Act, the provisions of which speak for themselves.

21. Paragraph 21 of the amended complaint constitutes plaintiffs' characterization of the Act, the provisions of which speak for themselves.

22. Defendants deny the allegations of paragraph 22 of the amended complaint.

23. Paragraph 23 of the amended complaint constitutes plaintiffs' characterization of the Act, the provisions of which speak for themselves.

24. Defendants deny the allegations of paragraph 24 of the amended complaint.

25. Defendants deny the allegations of paragraph 25 of the amended complaint.

26. Defendants admit the first sentence of paragraph 26 of the amended complaint. Defendants are without sufficient knowledge or information to form a belief as to the truth or falsity of the remaining allegations of paragraph 26.

27. Defendants are without sufficient knowledge or information to form a belief as to the truth or falsity of the allegations of the first two sentences of paragraph 27 of the amended complaint. Defendants deny the remaining allegations of said paragraph.

28. Defendants are without sufficient knowledge or information to form a belief as to the truth or falsity of the allegations of paragraph 28 of the amended complaint. Based upon information available to HHS through grant applications and materials and site reports, HHS has no basis to accept the truth of the cited allegations.

29. Defendants admit the allegations of paragraph 29 of the amended complaint.

30. Defendants deny the allegations of paragraph 30 of the amended complaint, except to admit that one part of the SeMo application cited in the second sentence of said paragraph refers to a clergy training aspect of the grant and that the provisions of its application speak for themselves. Based upon information available to HHS through grant applications and materials and site reports, HHS has no basis to accept the truth of the cited allegations.

31. Defendants admit the allegations of the first sentence of paragraph 31 of the amended complaint. Defendants are without sufficient knowledge or information to form a belief as to the truth or falsity of the remaining allegations of said paragraph.

32. Defendants admit the allegations of paragraph 32 of the amended complaint, but note that Idaho has been substituted for California by the grantee.

33. Defendants are without sufficient knowledge or information to form a belief as to the truth or falsity of the allegations of paragraph 33 of the amended complaint. Based upon information available to HHS through grant applications and materials and site reports, HHS has no basis to accept the truth of the cited allegations.

34. Defendants admit the allegations of the first sentence of paragraph 34 of the amended complaint. Defendants are without sufficient knowledge or information to form a belief as to the truth or falsity of the allegations of the second sentence of said paragraph.

35. Defendants are without sufficient knowledge or information to form a belief as to the truth or falsity of the allegations of the first sentence of paragraph 35 of the amended complaint. Based upon the information available to HHS through grant applications and materials and site reports, HHS has no basis to accept the truth of the cited allegations. The second sentence of said paragraph quotes a provision of the grant application of St. Margaret's Hospital, the provisions of which speak for themselves.

36. Defendants are without sufficient knowledge or information to form a belief as to the truth or falsity of the allegations of the first sentence of paragraph 36 of the amended complaint. Based upon the information available to HHS through grant applications and materials and site reports, HHS has no basis to accept the truth of the cited allegations.

37. Defendants admit the allegations of paragraph 37 of the amended complaint.

38. Defendants are without sufficient knowledge or information to form a belief as to the truth or falsity of the allegations of paragraph 38 of the amended complaint.

39. Defendants are without sufficient knowledge or information to form a belief as to the truth or falsity of the allegations of paragraph 39 of the amended complaint. Based upon the information available to HHS through grant applications and materials and site reports, HHS has no basis to accept the truth of the cited allegations. Defendants further state that the provisions of the St. Ann's application cited in the final sentence of said paragraph speak for themselves.

40. Defendants admit the allegations of the first two sentences of paragraph 40 of the amended complaint. Defendants are without sufficient knowledge or information to form a belief as to the truth or falsity of the allegations of the third sentence of said paragraph.

41. Defendants deny the allegations of the first and second sentences of paragraph 41 of the amended complaint, except to admit that this grant project proposes to be presented at three sites through three organizations, the South Texas Family Planning and Health Corporation of Corpus Christi, Texas, the Family Life Bureau of St. Cloud, Minnesota, and the Natural Family Planning Center of St Francis Hospital of Wichita, Inc., Wichita, Kansas.

42. Defendants are without sufficient knowledge or information to form a belief as to the truth or falsity of the allegations of paragraph 42 of the amended complaint. Based upon the information available to HHS through the grant application and materials of this new grantee, HHS has no basis to accept the truth of the cited allegations. The advertisement of the St. Cloud group, not shown to be related to the grant at issue, speaks for itself.

43. Defendants are without sufficient knowledge or information to form a belief as to the truth or falsity of the allegations of paragraph 43 of the amended complaint.

44. Defendants admit the allegations of paragraph 44 of the amended complaint.

45. Defendants are without sufficient knowledge or information to form a belief as to the truth or falsity of the allegations of the first sentence of paragraph 45 of the amended complaint. Based upon the information available to HHS through the grant application and materials of this new grantee, HHS has no basis to accept the truth of the cited allegations. The provisions of the Search Institute application cited in the paragraph speak for themselves. Defendants are without sufficient knowledge or information to form a belief as to the truth of falsity of the allegation of the fifth sentence of the paragraph that the Reverence for Life and Family curriculum of co-authored by John E. Forliti is "an explicitly religious program."

46. Defendants are without sufficient knowledge or information to form a belief as to the truth or falsity of the allegations of paragraph 46 of the amended complaint. Based upon the information available to HHS through the grant application and materials of this new grantee, HHS has no basis to accept the truth of the cited allegations. The apparent excerpt from the Search Institute application cited by plaintiffs makes no reference to the promotion of religion and religious values and speaks for itself.

47. Defendants deny the allegations of paragraph 47 of the amended complaint.

48. Defendants deny the allegations of paragraph 48 of the amended complaint.

49. Defendants deny the allegations of paragraph 49 of the amended complaint.

50. Defendants deny the allegations of paragraph 50 of the amended complaint.

The remainder of plaintiffs' amended complaint contains their prayer for relief, to which no response is required, but to the extent that a response is required, said allegations are denied.

All allegations not expressly admitted or modified are hereby denied.

WHEREFORE, plaintiffs' amended complaint should be dismissed with prejudice.

Respectfully submitted,

RICHARD K. WILLARD
Acting Assistant Attorney General

JOSEPH E. DIGENOVA
United States Attorney

/s/ BROOK HEDGE
Brook Hedge

/s/ LEWIS K. WISE
Lewis K. Wise

/s/ THEODORE C. HIRT
Theodore C. Hirt

Attorneys, Department of Justice
Civil Division, Room 3533
9th & Pennsylvania Avenue, NW
Washington, D.C. 20530
Telephone: (202) 633-4785

Attorneys for Defendants.

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Answer To Amended Complaint were mailed, by express mail, this 12th day of January, 1984, to:

JANET BENSHOOF
SUZANNE LYNN
NAN D. HUNTER
RANDEE PAVALOW
American Civil Liberties Union
Foundation
132 West 43rd Street
New York, New York 10036

and by first class mail, to:

BRUCE J. ENNIS
Ennis, Friedman, Bersoff,
& Ewing
1200 Seventeenth Street, NW
Washington, D.C. 20036

/s/ THEODORE C. HIRT
Theodore C. Hirt

Deposition Excerpts of
Reverend Robert E. Vaughn,
Methodist Minister of Beverly Hills Church

[Direct Examination by Mr. Millet:]

[65] Q Can you tell me how you felt as though your beliefs were denigrated on that first occasion?

A I felt certainly the full weight of Government going behind a particular program which is carried out by denominations whose views on sexuality differs from mine was a strong sense of denigration of my own, that the full weight of Government moving behind it and trying to espouse a particular view of sexuality, of which there are some shared elements, but also a number of different elements, so I felt my particular belief was denigrated by the giving of Federal moneys to a faith that I don't share.

Q Did the denigration of your belief as alleged [66] in that paragraph ever manifest itself in any way other than your own perceptions and your own feelings?

A In the sense that I was trying to be more articulate in conversations with others about the nature of our view of sexuality and distinction with other views, there was one manifestation of that, a greater awareness that in conversations about sexuality with persons who share very authoritarian view of how they view decisionmaking, that there needs to be careful articulation of religious perspective on sexual issues, being that one religious group has a backing of the Federal Government. And in that sense that greater articulation, that sense which was embodied in some conversations, some counseling sessions, certainly would have been—some educational work is probably the best examples.

Q Are those the same conversations, counseling sessions and educational work that we discussed previously today?

A Yes.

Q Has anyone ever criticized your religious beliefs because they were not reflected in the Adolescent Family Life Act or any program underneath that Act?

A Yes.

* * * * *

[70] Q Are the statements contained in that paragraph answering Interrogatory No. 8 true and correct statements concerning yourself?

A Yes.

Q Referring you to page 8, the last paragraph of that answer, the first line of that paragraph refers to your suffering spiritual injury. Could you please define for me how you suffered spiritual injury as the result of the action of the defendant in this case?

A Sure.

Your question could probably best be understood by recovering a – recovering a sense of unanimity that is present within the Hebrew mind that split off during the Greek era of the New Testament to put people in different spheres of life, let us say the economic sphere of life or political sphere or religious sphere, a sense of the united, of everything being one is the best way of understand[71]ing that, that spiritual injury is essentially referring to injury that occurs to all of one's self. Answering how that has been suffered is really in the same sense that we have spoke of before in defining spiritual injury is that which embodies injury to the totality of one's work, in doing one's work rather than trying to see that as being support of a spiritual thing separate from the day to day work.

Deposition Excerpts of
Reverend Lawrence W. Buxton,
Minister of Floris Methodist Church

[Direct Examination by Mr. Millet:]

[32] Q Mr. Buxton, I am going to show you what has been marked as Exhibit 2. Can you examine that please and tell me if you recognize that as copy of the amended complaint filed in this action?

A Yes, that is my understanding of what it is.

Q Would you look to page 5, paragraph numbered 9 and tell me are you the individual referred to in that paragraph?

A Yes.

Q Are the allegations contained in that paragraph true to the best of your knowledge?

A Yes.

Q Directing your attention to the second to the last sentence in that paragraph, can you tell me how your [33] beliefs have been denigrated by any action of the defendant in this case?

A I think both my beliefs, my devotion to the community and my efforts to communicate those beliefs have been made much more difficult, both in the ways that I am saying and by the sense that –

Q Let us go to your beliefs first and then we will talk about the other areas as well.

Can you tell me how you beliefs have been denigrated?

A Yes, it think what has happened is that in some sense the Government has become my competitor and that when my beliefs are in the marketplace along with what the Government gives its official approval, stamp of approval on, that my beliefs suffer by comparison, that they are not officially approved beliefs, that I don't have the money that the other grant recipients do to express these and to put these out there.

So by comparison my beliefs are minimized in importance.

As I understand the word "denigrated" to talk about, be besmirched or more difficult if somehow rendered not as important. I find that I have got big opponents [34] saying something contrary to what I believe.

Q Is it part of your ministry to convert individuals to the United Methodist faith?

A It is part of my ministry to convert individuals to Jesus Christ. If they happen to be Methodist, then that is one thing. If they happen to be Presbyterian, then that is something else.

* * * * *

[42] Q Mr. Buxton, would you look at what has been marked as Exhibit 3 and tell me if you can identify that as copies of the answers to defendant's interrogatories that were filed in this case?

A The first set, yes, that is what I see.

Q Would you turn to page 9, paragraph 12 and tell me, are you the individual to whom those answers refer?

A Yes.

Q Are those answers true and correct to the best of your knowledge?

A Yes.

Q Referring you to the last paragraph of that answer, can you tell me please how you have suffered spiritual injury in this case?

A I think primarily as a United Methodist minister one thing that has been very definitely injured is the spirit of cooperation among denominations all of the same church. And I think there has entered into this now a spirit of divisiveness, I think competition is perhaps the [43] best word, that I think this Act fosters and encourages. I don't know if it deals with the type of thing that you are asking, that some of the comments or the phone calls or the hate

mail that has come to me in some way constitutes spiritual injury to me and to my leadership in the church.

Q What type of phone calls?

A I have gotten phone calls from some people who have not identifed themselves and then consequently anonymous hate mail using baby-killers and this kind of terminology.

Q When did these phone calls or hate mail begin?

A Shortly after I would say the suit was filed, late fall of last year when newspapers would pick up – the case had been filed and that my name was used.

Q Did you ever get such letters or phone calls prior to the filing of the suit?

A No. No. I would say those two areas, one is more personal and one is more mine, representative of my denomination, injured in the spirit of cooperation.

Q Can you give me some examples of how there has been less cooperation since the passage of the Adolescent Family Life Act?

[44] A I wouldn't say there has been less cooperation but the spirit, it is not the phrase that I would choose. But the spirit by definition is something that is not completely tangible, so it is hard for me to give you concrete, tangible things other than I sense there is more suspicion or paranoia or distrust and perhaps there were events or occasions that might have taken place ecumenically that have not, because of this spirit of distrust. That is hard to be concrete about, I know, but that is my perception of what has happened.

Deposition Excerpts of
Rabbi Jack A. Luxenburg,
Member and representative for
the American Jewish Congress

[Direct Examination by Mr. Millet:]

[33] Can you tell me how the American Jewish Congress and the Jewish religion have been denigrated or disadvantaged in this case

A Yes, I think I can. I think I can with firsthand experience. Since coming to Rockville three years ago, I had been invited, at least three times, which I clearly recollect, I think there may have been a fourth, to address teachers of the Montgomery County Public School System, specifically those teachers who are chartered with presenting the curriculum on family life and human development. I have been asked to speak to them in terms of Jewish teachings on matters of sexuality, etc.

As you might well imagine how many of the matters about which we are speaking this afternoon are topics for exploration. I have found that when presenting the point of view which I think is espoused, which I think is rabbinically responsible, Jewish authentic, and to the greater degree, is not completely incongruent with the position of the Act, I have found that there are those who differ with me among the teachers, who I would say unfriendly, unsympathetic, in a couple of cases even tacky.

I respected their opinion and the intensity [34] with which they hold it.

Nonetheless, I think that this raises a difficult problem.

Firstly, these teachers are in classrooms with children of mixed religious traditions, maybe of no religious tradition. They feel already disinclined towards at least one significant religious tradition, possibly represented in their classroom. I think that it would be a further denigration of Jewish religious teaching and tradition should these same

unsympathetic persons be in a position to point out what is tantamount to Government approval of a position in which they themselves may likely espouse, in contrast to that which Jews or any other persons in their classrooms may espouse.

I would find that that situation would open up persons who hold differing points of view from that which has been granted Government approval. I think such a situation would hold such people up to denigration, I think it would make it difficult for them to put forward in the public school classroom their differing points of view in instructional situations—assuming such a teacher was charged by virtue of responsibly formulating a program to invite clergy with differing points of view in, I could [35] not help but wonder what kind of reception, say a person I would receive in such a classroom.

Q Were these teachers that you addressed in Montgomery County participants in any program on the Adolescent Family Life Act?

A Not to my knowledge.

Q Was you address to them part of any program under the Adolescent Family Life Act?

A I don't know whether the program was—whether or not the program of Family Life education in Montgomery County schools is funded through the county exclusively or has received supplementary funds through this Act, that I do not know.

Q Can you give me any other examples of how you believe the religious beliefs of the American Jewish Congress or the Jewish religion have been denigrated by the actions of the defendant in this case?

A I believe that by holding up a very specific set of values and principles so closely aligned with those of particular and identifiable religious communities here in these United States, subjects the American Jewish Congress to denigration when they speak out to express their differing

point of view, seeing as how that point of [36] view stands in distinction to the values articulated by the Act and implicitly condoned by the Act and in given Government sanction.

I am only saying so that the Congress then, I think, becomes a target for those who would villify and attack persons who hold contrary points of view.

Q Do you know of any instance where the American Jewish Congress or you in particular have been attacked or villified, as you put it, or criticized in any way for your religious beliefs because they were not contained in the Adolescent Family Life Act?

A Not because they were not contained but certainly because they differed from. But I am sure—I am not sure that we could attribute those instances to the Act. However, we certainly could attribute them to the fact that I hold opinions contrary to those established as acceptable by the Act.

Q Did those kinds of attacks or villifications or criticisms occur prior to the passage of the Adolescent Family Life Act in your experience?

A Some prior to the passage of the Act. I have had similar experiences since the Act has been in effect.

* * * * *

[49] Q Referring you again to Exhibit No. 3, Answer No. 18, the second paragraph, the second sentence refers to the term spiritual injury. Could you please define that to me as it relates to the American Jewish Congress in that answer?

A Yes. I think that spiritual injury here might well be understood as that erosion of religious certainty and security and the teachings of one's traditions when they are made to be perceived to be as contrary and in conflict with that which has been given the stamp of social approval.

Q Are you aware of any instance where anyone has expressed uncertainty to you or to anyone associated with the American Jewish Congress about the religious traditions of the Jewish faith as a result of the Adolescent Family Life Act?

A Again, not with specific reference to the Act but with reference to legislative thrust which the Act represents.

Deposition Excerpts of
Homer A. Goddard,
Unitarian Universalist Minister of
the First Parish of Sudbury

[Direct Examination by Mr. Millet:]

[48] Q Reverend, in the third paragraph of that answer there is a reference to spiritual injury. Could you please define for me what you meant by the use of the term spiritual injury, in answer to that interrogatory?

A What I mean by spiritual injury is that the Federal Government is in a major way teaching views contrary to both mine and my denomination, and I think I have to say that I think that they are injurious to people that are being denied certain information. That is clearly a spiritual injury.

Q That is a spiritual injury to you?

A Yes, it is.

[49] Q That other people have been denied information?

A When people are being hurt, yes.

Q Any time another individual is injured, that is a spiritual injury to you?

A That is correct.

Q Can you tell me how you have been adversely affected in your daily life, as stated in the second sentence of that same paragraph on Exhibit 5?

A Because I have a very clear view of my role as a spiritual leader in my church, and in my community, and we are now faced with very real competition, as it says in that sentence, to what we believe in our teaching, and it is being funded and supported by the Federal Government.

Q What do you mean by competition?

A I think that is a very apt word today, because the marketplace of religious ideology is very free and open,

and when the government becomes a participant in that competition, then it is very unfair.

Q So when you refer to competition, do you mean competition between different religious doctrines, or followers?

A That is correct. Not necessarily for followers, but the way they operate as human beings. I don't care who follows what. It is the way one behaves as a human being [50] in society, and that reflects upon oneself, and the people with whom one comes in contact with, and I think this is injurious to a large number of people.

Q And because it is injurious to them, you believe it is also injurious to yourself?

A I think inevitably it will be. It is just when it is going on, and when it is just a few miles away, it is clearly there.

Deposition Excerpts of
Dr. Emmet W. Cocke, Jr.,
Minister of the Mount Vernon
United Methodist Church

[Direct Examination by Mr. Millet:]

[42] Q Directing your attention again to paragraph 10 on pages 5 and 6, if you would, please. Particularly right now to the portion of it reproduced on page 6.

In the sentence which reads that your "beliefs and devotion to the United Methodist community and your efforts to communicate your beliefs are being denigrated by the funding and promotion," et cetera.

Can you tell me, please, how your efforts to communicate your religious beliefs have been denigrated by any action of the defendant in this case?

A When a religious organization enjoys the official endorsement of the government, as in the case of the Adolescent Family Life Act practice, the Catholic Church in my community or the religious groups nationally enjoy favortism, there is the violation of separation of the church and state.

[43] Q Has any action –

A Well, let me go ahead.

Q Go ahead. I don't mean to cut you off.

A Religious organizations can compete with ideas, but when one religious organization enjoys government support and endorsement, then freedom is violated because of that endorsement. And in this case, I experienced the fact that United Methodists do not have the official sanction of government or the force of civil religion which government sponsored religion could be called.

Also I believe that this Act is just one of many possible violations of the separation of church and state, with special interest groups insistent upon laws of private and public schools or other kinds of government sponsored

religion, this Act becomes very important as an indication of the need for new vigilance for the separation of church and state and freedom for religion. And because I am committed to that separation and that freedom, I very much feel as a victim of what the Act does.

* * * * *

[52] Q Would you turn to pages 11 and 12 of this document and Interrogatory 16, and particularly the answer to No. 16.

Would you review that answer and tell me if it is accurate?

(Pause)

A I have reviewed it and it is accurate.

Q Can you tell me what you mean by the term or what is meant by the term "spiritual injury" contained in the third paragraph of that answer on page 12?

A Spiritual injuries are hard to measure, but when the government endorses one religious group, and in my case where the Arlington Diocese has been endorsed and my denomination has not been endorsed, the perceptions of a society are subtly influenced in such a way that my force and conviction is as one not too favored, is lessened.

Q Is that your understanding of the term "spiritual injury"?

A Yes. It is an attack upon the truth, the truth for free expression of religion and free expression of ideas in a [53] society where freedom of – freedom is supposed to be practiced in speech and religion and the press and all ways.

I further believe that when other religious groups whose ideas are not as of the United Methodist strength have the added strength of the government that United Methodism is placed unnecessarily on the defensive in the pursuit of truth.

Q Referring to the second sentence in that paragraph, Doctor, the sentence that reads "This adversely effects you

in your daily life," apart from those matters that we have already discussed this morning, can you give me any examples of any way that you have been adversely affected in your daily life?

A I believe my previous answers have indicated that I feel the weight of having to defend religious freedom, and this Act hangs over us as a part of the attack on religious freedom, separation of church and state, which I—which from day to day I feel is a burden, but I am called to give out.

Deposition Excerpts of Marjory Mecklenburg, Deputy Assistant Secretary for Population Affairs; Director, Office of Adolescent Pregnancy Programs

[Direct Examination by Ms. Hunter:]

[31] Q Um-hum. Did you review for yourself any of the reader's comments on Catholic Charities of Arlington?

A Again, I could not recall if I did. There may have been some situations in which I did and some of which I didn't. And I could not tell you which ones, I really cannot.

Q Did you review any of the reader's comments for any of the applications from organizations that had religious affiliations, for example, Catholic Charities or other Catholic organizations?

A Once again, I wasn't—I do not recall which applications or which reader's comments I may have looked at in 1982. I had a lot of information from a lot of sources. And there were over 400 applicants, as I can recall.

Q Um-hum. Did you do anything other than rely on Mr. Sheeran's phone calls to the applicants a few days before the funding decisions in 1982 in order to ascertain the degree of possible religious involvement of the applicants about which he had raised some concern?

A Prior to the grant award?

Q No question.

A No, not that I can recall.

Q With regard to the St. Margaret's application from [32] Massachusetts, were you aware at the time you made the funding decision to fund St. Margaret's that a number of the programs to be presented with the Title 20 funds were going to be presented in parochial schools?

A Once again, I don't recall reviewing the grant application of St. Margaret's. So that level of detail either the

readers or the staff might have been aware of, but I don't recall a personal review.

Q Do you recall taking any steps to investigate the religious setting of, or the religious materials associated with the St. Margaret's application?

MR. HIRT: That's a compound question. But I will let her answer since I don't want to engage in endless colloquy.

THE WITNESS: Once again—Well, let me see. Did I take any steps prior? I did not, since I did not review the materials personally. I don't recall personally taking any steps regarding St. Margaret's. St. Margaret's had been a Title 6 grantee. I don't remember whether the staff suspected any particular problem or felt they needed any clarification. I assume they would have alerted me or carried out the appropriate activities, if someone called. That would have been their responsibility in presenting the information to me to make a decision.

* * * * *

[48] Q Can you tell me which grantees Mr. Sheeran called?

A I would not have any way of knowing or recalling for certain all of them. I certainly do remember Catholic Charities of Arlington, and I do remember Wayne County Social Services, I remember those. I do not recall if he did call others or not.

Q Did you seek any—Did you discuss this issue prior to the 1982 funding decisions with Mr. Brandt or anyone who was in a supervisory position to you or higher in the chain of command in the agency than you are?

A What, the religious issue?

Q Yes.

A I don't recall. So I don't believe that anyone would be surprised to see a Catholic charity on a list of organizations providing services to pregnant women. They were

doing that for years. And so I don't recall. And I don't see why anyone would have been unduly alarmed.

Q With regard to the issue, again, or religious involvement of the applicants in 1982, did you seek any guidance or any clarification on that issue from anyone other than what you have already described in your testimony [49] prior to making the funding decisions?

A I cannot, I cannot recall. Religion was not an overriding concern or preoccupation with me at the time.

Q In the 1983 funding decisions that you made pursuant to Title 20, did you take any steps at that time to ascertain religious involvement of any of the applicants?

A I'm sure that if something came to our attention that was, you know, was flagged by the review process, that that may have occurred. But I don't recall any specific activities in that regard.

* * * * *

[59] Q With regard to the St. Ann's Infant and Maternity Home in the 1982 application, I'm going to read to you from the comments of the external reader and ask you if upon hearing those comments you recall having read them or having had any discussions with anyone concerning these comments or any similar comments.

The comment states in part "definite bias toward all contraception methods except natural family planning as one would expect." Do you recall having read that comment or any similar kind of comment regarding the St. Ann's Infant and Maternity Home?

MR. HIRT: I think counsel should see the document.

THE WITNESS: There's a bias toward? I want to see it.

(The witness viewed the specified document.)

THE WITNESS: Down here. "Bias toward all contraception methods except natural family planning."

No. I'm not even sure what it means upon seeing it [60] right now. But "a bias toward all contraception methods

except natural family planning as one would expect," no, I certainly was not aware of that particular comment.

BY MS. HUNTER:

Q All right. If you had reviewed that comment or seen that comment would you have have taken any steps to investigate further any possible religious involvement on the part of that applicant?

A As I said, I'm not sure yet what it means. "A bias toward all contraceptive methods except natural family planning." I don't understand what would be religious if someone had a bias toward all contraceptive methods except natural family planning. I don't regard that as necessarily a religious statement. So I don't recall that I would have done anything about it if I had seen it.

Q Um-hum. I believe the final phrase of that sentence was "as one would expect." Do you think the phrase "as one would expect," in conjunction with the application from the St. Ann's Infant and Maternity Center would lead you to take any steps to investigate any possible religious activities?

A I don't necessarily view one's attitudes about various contraceptives as necessarily a religious kind of bias. And "as one would expect," is very peculiar in this [61] regard. Because the statement "a definite bias toward all contraceptive methods except natural family planning as one would expect," I don't construe as having any religious overtones at all.

Q Um-hum. So your answer is, no, you would not have taken any further action; is that correct?

MR. HIRT: I think she has answered the question.

THE WITNESS: Yes, that's true.

BY MS. HUNTER:

Q OK. In regard to the readers comments on the Southeast Missouri Association of Public Health Administrators in Missouri, do you recall anything in any of

the reader's comments or in the grant application which indicated that instructors from area churches will be trained to lead parent/child group seminars?

A That, again, would be a level of detail that I would not have, don't recall seeing.

Q And had you seen a comment or something in the application itself to that effect, would you have taken any steps to further investigate any possible religious involvement on the part of that applicant?

A Excuse me. Could I look at the document before I answer that question. I need to see the phrase in this [62] document.

Q You can see it in this document, but I'm not limiting it to this document.

A But you said something like that.

Q Something like the phrase I read, not the document.

A I want to see the phrase so I can answer the question.

MR. HIRT: You read from the document. Maybe if you show her the document.

MS. HUNTER: You can see the document or we can have the question read back. But I want you to understand I'm not asking you about the document. I'm asking you about the specific phrase either in that document or in any other document. Do you understand that question?

THE WITNESS: Yes, I understand what you're saying.

It was "Parents and children will attend seminars together in a church setting pre and postnatal." Excuse me.

MS. HUNTER: I think it would be helpful if we had the question read back so you can focus on the question.

THE WITNESS: OK. All right.

(Record read.)

THE WITNESS: Most likely in that situation at that time, no. The legislation calls for the involvement of

churches as one of the community organizations to be involved. There [63] would be no reason for me to suspect that people who belong to a church could not carry out the intent that the program called for in Title 20 whether they were holding this in a church setting or not a church setting. So I don't think I would have done anything specific, you know, in that regard at that time.

* * * * *

[67] Q Um-hum. Other than speculating as to what you may have done, do your recall specifically any steps you took with regard to seeking staff input as to the nature of the religious materials?

A Prior to the funding?

Q Prior to the making the fundiong decisions; that's right.

A No. But again, I assume that it was discussed. Whether I initiated it or somebody else did, you know, I'm not clear. But if we were discussing Catholic Charities, if we were discussing Search which was an applicant both years and scored high in both years, as is my recollection, it's quite possible that the topic came up, you know. I think it's possible.

Q It's possible they did and it's possible they didn't is that correct?

A Yes.

MR. HIRT: You're asking her to speculate, so she obviously is.

MS. HUNTER: That's right.

MR. HIRT: She's answering. I'm not going to concede that she's speculating.

[68] MS. HUNTER: I may hold you to that.

MR. HIRT: I clarified too quickly.

MS. HUNTER: I guess the record will speak for itself.

MR. HIRT: Yes.

BY MS. HUNTER:

Q With regard to the grant applications in 1982 or 1983, were you aware of whether there were any grant applications that included services or salaries for religious staff as part of the non-Federal match which was required from the Title 20 applicants?

A Again, that would be part of the staff review process. Unless it was brought to my attention specifically I would not know it's a level of detail that they would be responsible for calling to my attention.

Q Was there any policy in the office at that time with regard to the appropriateness of the non-Federal matching including religious salaries or staff time?

A Only from the standpoint that the issue had been raised in a general sense, religion in a general sense. I don't recall any particular kind of prohibition against having a person with a religious affiliation presenting Title 20 material as long as what they were doing was not promoting religion. So it probably was not an issue.

[69] Q Would it be corrct to say then the policy was that including religious salaries or staff time wihin the non-Federal match was acceptable?

MR. HIRT: I think you're leading her. Why don't you ask her one way or the other.

MS. HUNTER: I asked and I'm trying to clarify her answer.

MR. HIRT: Again, I think religious staff is a term that's unclear.

THE WITNESS: Yes. I could not say whether—It would seem to me that—Let's see now. It would seem to me that on its face a religiously affiliated person could be paid for doing appropriate activities within Title 20, and they could be receiving some money for it whether with Federal match or with Federal funds. However, one wants to look at it. The question is what were they doing and so I don't recall any policy at the time.

BY MS. HUNTER:

Q All right. Let's make the record very clear.

With regard to this question of non-Federal matching including salaries or staff time, was it the policy of your office that the inclusion of staff, the inclusion of salary to a clergy member would be acceptable as part of the non-Federal [70] match depending on the activities of the clergy member that were funded with the Federal funds?

A I don't really recall that ever coming up. And I would say that what we had—issue that you would have to divide here—You're saying clergy member now?

Q Yes.

A Not just religious affiliation. You're talking about clergy member?

Q Yes.

A I don't recall that any kind of a policy was ever made on that or that that issue itself was ever brought to my attention. I would have to consult with lawyers and think about that carefully. And I don't recall that it was ever brought to my attention.

Q What was your position on that question? Did you have a position?

A I don't—Since I would have to consult with lawyers now, I would not be able to say that I had—I'm saying I probably don't have a position now without consultation regarding what would be appropriate. So I would not have had a position then either. I assume.

Q What about with regard to salaries or staff time of employees of a religious institution or church, non-clergy [71] employees? Is that what you meant earlier when you said persons with religious affiliations?

A Yes. I think it might make some difference what level we're talking about of an individual. However, once again, I think it's an issue which could be complicated and I would have to have guidance from attorneys.

One of the kinds of things that would be important is what kind of activity, clearly, they were involved in, and what portion of their time they were doing what. But I'm not a lawyer and I would have to consult with them if that question were to come forward in a specific way for a grantee.

Q What about with regard to an in kind of non-Federal match including estimated amount of rental or payment for the use of religious facilities. Was that an appropriate portion of a non-Federal match in a Title 20 program?

A Once again, that is an issue that we would have to consult with attorneys about when it's brought to our attention as a particular problem. And so I would have to look at each issue very carefully and get legal advice once I was aware that a problem, potential problem existed.

* * * * *

[76] BY MS. HUNTER:

Q Would you have considered the fact that programs were to be presented by a grant applicant to primarily or only to parish or parochial audiences to be relevant to the consideration of the nature of the population to be served?

A When I was looking at the population to be serviced, I was thinking primarily in broader terms. No legal interpretation had been made at that time that I was aware of or that I participated in that that would have been a particular problem. I mean, I would say that that kind of a question needs legal interpretation in order to know whether it should be something I would take into consideration. And I don't believe that I had that kind of legal interpretation prior to the grant awards being given.

Q Did you take any steps, other than what you have already described in the deposition, to ascertain what the nature of the audiences would be for the programs to be

presented with Federal monies from religiously affiliated applicants?

A Since I did not perceive it as a particular problem, at the time, to present appropriate Title 20 material to religiously affiliated audiences, obviously that didn't occur [77] to me as a problem at the time.

Q Would it have been relevant to your determination of whether there was a broad basis of community support that the programs were to be presented only to parish or parochial school audiences?

MR. HIRT: You asked that question before.

MS. HUNTER: No. I asked a different question.

MR. HIRT: Go ahead.

THE WITNESS: I'm afraid I'm going to have it repeated. I'm sorry.

MS. HUNTER: Go ahead.

(Record read.)

THE WITNESS: Again, I would need legal counsel to tell me that it should be relevant to my concern. If there is a legal problem with that then it would be something that I should be concerned about. If there is no legal problem in that, then it is not something I should be concerned with.

BY MS. HUNTER:

Q Did you consider it relevant at the time?

A I don't recall that I did consider it relevant at the time. I do not recall that.

Q Do you think there is any relevance between the presentation of programs only to parish or parochial school [78] audiences and whether there is a broad basis of community support for a program?

MR. HIRT: Except for changing tenses and verbs, which I think is not a substantial change, you're asking the same question yet another time.

MS. HUNTER: It is a change.

MR. HIRT: Do you think it presents is the same thing as do you think it's relevant. I don't think the change in verb

tenses or terminology changes the question. She already answered. I will let her answer it again.

MS. HUNTER: The record will speak for itself. It's a different question. Why don't you read the question back?

(Record read.)

THE WITNESS: In my view I would like the program to be presented to a broad group of individuals and not confined to any particular groups. That's what my view is.

* * * * *

[82] Q With regard to those applications that were not from the health department but were religiously affiliated organizations, did you take any steps to ascertain whether there would be any religious influence from other activities conducted by that organization on the Title 20 program?

[83] A Not unless there was some pressing problem staff member or someone had looked in detail at the problem and brought it to my attention. And I would presume that in the case of some of the phoning that took place that that was one of the kinds of concerns that could have been covered in that situation in the staff review.

Q Were you aware at the time that you made any of the funding decisions in 1982 or 1983 that some of the programs as described in the Title 20 applications included presentations to be made by members of the clergy?

A That, again, is a level of detail that I would not be aware of but that my staff would have. And, again, could have been part of the religious discussion.

Q Um-hum. In your administration of your office, would there have been any problem, had you been aware, that some of the Federal monies would have been used to include presentations by members of the clergy?

A Had I been aware, I would have had to ask legal counsel and clarify the situation.

Q Did you seek any instructions or any guidelines concerning the participation by members of the clergy in any

of the Title 20 programs from Mr. Brandt or anyone else higher up in the agency?

[84] A Since it was not brought to my attention there was any problem, I would not have raise it with Dr. Brandt.

Q With regard to any aspects of religious involvement in any of the Title 20 grantees, did you seek any instructions or any guidelines from Mr. Brandt or from anyone else higher up in the agency?

MR. HIRT: Again, assuming there is.

Go ahead.

THE WITNESS: You know, I can't recall that the problem was raised by my staff in their review. So obviously it was not presented since I was not aware that the problem existed.

* * * * *

[91] Q With regard to Mr. Doerflinger of the Bishops Committee for Pro-Life Activities, you met with him, I believe, on March 13, 1983?

A Um-hum.

Q What was the nature of your meeting with him?

A He's included because they have—the Bishops Committee has an interest, as a lot of other people do, in the kind of activities I'm involved in in the administration including Family Planning and Adolescent Family Life. And I was unsure about exactly what the topics were. It could have ranged over a number of issues with him. And most likely he did ask about Adolescent Family Life and we had some discussion [92] about it. I think as a program rather than about any particular grantee or implementation of the Act, just in a more general sense about the program and the kind of progress we were making.

Q Um-hum. Did you discuss with Mr. Deoerflinger any of the—Strike that.

Do you recall discussing with Mr. Doerflinger the Adolescent Family Life Act specifically?

A I believe I must have because his name is here and I think that's the case. The Act, the program, the Act, whichever, you know, however you want to discuss it.

Q Do you recall discussing with him any of the grantees?

A That I do not recall.

Q The next person you have indicated is Dorothy Daily of National Catholic Charities, but you indicated without a date.

Can you tell me what basis you used to answer the question if it was other than your calendars?

A She is someone who has been concerned about Adolescent Pregnancy Programs and who requested a meeting with me to discuss the Adolescent Pregnancy Program. And I recall even though I could not find it on my calendar that I had met with her. And so the date was missing, I guess, but to discuss the Act and the program, the general goals of the [93] program, I guess.

Q Um-hum. Did you discuss any of the applicants or grantees with Miss Dailey?

A I don't recall ever having a substantial conversation with her about any particular grantee. It's more in a general sense, the program.

* * * * *

[141] Q Were there any recommendations from any Congressional offices as to external readers?

A I would not be surprised if there weren't people who would have recommended—that there were Congressmen who recommended people. I can't recall any specific instances, but it would not surprise me if something like that occurred. I [142] hear regularly from Congressmen about a variety of issues.

Q Were there any recommendations from the offices of Snatts or Hatch?

A I could not recall if that was the case.

Q Do you recall specifically with regard to Snatts or Kennedy?

A No, I could not recall. It's possible, but I could not recall.

Q Do you recall with regard to Senator Denton?

A I do not. But it would be possible.

Q What about with regard to Senator Helms?

A It's possible, but I cannot recall.

Q Do you recall why there were a number of persons chosen who were employed by or affiliated with Catholic Charities or other Catholic organizations?

A Any religious affiliation in the reader process, you know, was in my mind, neither a requirement or a disqualifyer. It simply was an attribute that they may have possessed. Perhaps it's because there are many, I mean, there are many Catholic and other religiously affiliated individuals very much involved in providing services to pregnant adolescents throughout the country. And it would be reasonable that some of them might indeed be representative of that community in this kind of a list.

* * * * *

[144] BY MS. HUNTER:

Q That's right. And were there any other clergy—Were there clergy from any other faiths who were selected to be external readers?

A I don't know.

Q Can you tell me why there apparently were relatively few persons selected who were affiliated with local or state health agencies, public health agencies?

MR. HIRT: Plaintiffs' counsel is characterizing. No foundation for that. But go ahead.

THE WITNESS: The list of readers from the suggestions that I had available to me at the time is one which represents a number of disciplines, number of different kinds of expertise including medical expertise.

BY MS. HUNTER:

Q I'm asking with regard to public health agencies, Miss Mecklenburg. Please try and listen to the question and answer the question.

MR. HIRT: She is trying to answer the question.

THE WITNESS: I am trying to answer the question. I am not certain myself whether some of these physicians or nurses might be associated with state health departments or county health departments or in the past have been. I have no [145] idea.

BY MS. HUNTER:

Q What about with regard to—

A The health areas was important. And it is included particularly, you know, that would seem to me to have been the important thing that the health area was represented.

Q What about with regard to local family planning councils or organizations. Can you explain why there are few, if any, persons on the list who are affiliated with local family planning organizations?

A Family planning is a very—is one part of this program. But it's not the main thrust in the prevention area. And certainly it isn't the main thrust in the care area. So it may be that no names were submitted to me with particular interest in either postponement of sexual activity or in care services for already pregnant teenagers. It must be that I did not have before me names from family planning councils who had an interest, or someone identified, having an interest in serving as a reader in this program or I would have considered them.

Q What about with regard to foundations that have been active in the area of funding projects on the topic of teenage pregnancy or sexuality?

[146] A One can always find other kinds of groups who are not included. I would not testify for sure that no one involved with a foundation is on this list.

Q With regard to the—Strike that. Had you ever selected field readers before 1982?

A No. But I participated as a field reader before 1982. I was asked by the Federal Government, by ACYF, to serve as a field reader on applications.

Q Had you had any experience in selecting a panel of field readers?

A No. But I had people who I knew and who I communicated with regularly, including staff members, who did have experience.

Q Did you seek recommendations for field readers from anyone other than the OAPP staff?

MR. HIRT: Isn't that—

THE WITNESS: I testified earlier that there was other information available to me or given to me already and in some cases I did ask, make contacts specifically to ask for suggestions. Those kinds of contacts were wide and varied and I could not relate those at this time.

BY MS. HUNTER:

Q With regard to the comments that were actually [147] furnished by the field readers in 1982, I believe you testified previously that there was at least one comment that was brought to your attention by the staff as having what you described as religious overtones.

Do you recall who the author was of that comment?

A I don't wish to represent it as saying it had religious overtones. The staff person who brought it to my attention said it did. I don't recall the comment specifically, and I do not recall the individual. I do recall the incident in a general sense.

* * * * *

[164] Q Directing your attention to the 1983 grants decision, do you recall making a decision not to fund the University of Arkansas in that funding cycle?

A In reviewing materials with my counsel, yes, my memory was refreshed that I did not fund the University of Arkansas.

Q Do you recall that there were projects that scored lower than the University of Arkansas that were funded?

A In viewing, the materials, again right prior to the deposition, yes, I refreshed my memory that there was someone with a lower score that was funded.

[165] Q And do you recall that the office staff recommended or that the recommendation was made to you that the University of Arkansas be funded in 1982?

A Well, obviously the review committee or panel recommended a number of people for funding, including the University of Arkansas, including all the people that I funded.

Q What was the basis of your decision not to fund the University of Arkansas?

A It's always difficult to try to think in terms of all the information one had available at the particular time you made a decision.

I will say first that it is the director's responsibility to make those decisions. They do not accept either from the staff or from the review committee generally completely all their recommendations or they would have no role except to sign the check, so to speak, and send the letter out. It is the director's duty to apply the appropriate criteria and to make the funding decisions.

So having said that, it seemed to me that in preparing for this deposition and doing at least a cursory look at the information I had available at the time that I felt that the organization that I chose to fund was more complimentary and provided a different perspective than the University of [166] Arkansas. It was somewhat of a different model in a different kind of program. And after all, this is a demonstration evaluation program with the idea of getting a variety of models. And that was one of the kinds of criteria that I needed to look at.

And so I chose a fundable project, but one which I felt was a bit more unique and somewhat added, complimented the existing grantees.

Q What was the other project you are referring to?

A Well, the University of Arkansas. Oh, the one I funded? Families of America.

Q And were there letters received by you prior to that funding decision which discussed criticisms or complaints concerning the University of Arkansas?

MR. HIRT: Received by her personally or by the office?

MS. HUNTER: That she saw.

MR. HIRT: OK.

THE WITNESS: I was aware of letters both of complaint and support for the project in the University of Arkansas.

BY MS. HUNTER:

Q Um-hum. And were the letters of complaint oriented to the fact that the University—in some cases at least the [167] University of Arkansas program had utilized materials associated with Planned Parenthood?

A I can't recall the details of the letter of what the complaint was. I do know that—I do recall that there were letters concerned about the contents of the program. I can't tell you the specifics at this point of what the complaints were.

Q Had the Families of America applied for funding in 1982?

A In preparing for this deposition, I believe someone mentioned that they had. I was not necessarily aware of that at the time I funded them.

I don't recall that except I believe someone said that. So it's probably so.

Q Do you recall whether the 1983 application from FAF contained references to religious activities?

A Again, you would have to clarify what you mean by religious activities.

Q I'm asking you whether the FAF 1983 application described any activities concerning religious lectures, religious teachings or religious materials that were to be supported with Federal funds?

A Certainly not my recollection that Federal funds—[168] My recollection or my intent in funding them with Federal funds is that the Federal funds would not be used to utilize religious materials or to put on religious classes.

Q Were you familiar with the sites that were going to be used by FAF?

MR. HIRT: In '83?

MS. HUNTER: Yes.

THE WITNESS: I suspect that I saw there were sites at the time. I certainly couldn't tell you at this point, except again in preparing for this deposition, I understand that Minnesota had one of the sites. But you know, I was not aware of—I mean, I could not recall for you what the other sites were because I have no idea. This was not raised prior to the deposition. But I know there were multiple sites. And I probably knew there were multiple sites. I'm sure I did at the time. So I probably was aware.

BY MS. HUNTER:

Q Did you take any steps to investigate any possible religious involvement in the FAF program as it was described in the 1983 grant application?

MR. HIRT: In terms of the time period before the funding decision?

BY MS. HUNTER:

[169] Q Before the 1983 funding decision?

A I believe, I can't recall specifically, but I believe I was satisfied that they would not be promoting religion in that project as we funded them.

Q What was the basis for your conclusion that they would not be promoting religion?

A I cant't recall. It's possible there may again have been some contact. I'm trying to—It's possible they may have been contacted prior to the grant award. I can't recall specifically. I suspect there may have been.

Q Do you recall specifically any actions that you—Strike that.

Do you recall specifically any input you requested with regard to the 1983 FAF grant application?

MR. HIRT: Any input from the staff?

BY MS. HUNTER:

Q From anyone.

A It would be unusual to not have requested input on any application in that process from some staff member or from another source. But I cannot—I couldn't tell you specifically for that application what it is, what input I got from whom.

Q Did you take any steps to investigate the complaints [170] that were received concerning the University of Arkansas program?

A That would be an appropriate staff function. And I know the staff was involved in talking with people at the college level. There were letters, as I recall, return letters to some of the people who had written letters. I even recollect that there were some changes made in that program, at least in one site. I don't know whether there were changes made in all the sites. But there were a number of difficulties surrounding that Arkansas project. And my staff was involved with the project. That I do remember.

Q Did your staff recommend that Arkansas be funded or not funded?

MR. HIRT: This is the staff as compared to the Ad Hoc Review Committee?

MS. HUNTER: Yes.

THE WITNESS: I cannot recall.

BY MS. HUNTER:

Q Can you describe any specific information that you received, other than what you have already described, concerning the complaints that were made about the University of Arkansas program?

A I could not recall anything more specific than I have [171] already testified to.

Q I believe Mr. Hirt offered earlier in the day that at some point in 1983 you met with Mr. Hurley and Mr. Wilson of FAF. Do you recall that meeting?

A I do remember meeting. Well, I have met with some members. Who did you say? Sula Hurley was one, and what was the other person?

Q Wilson.

A Mercedes Wilson. I have met with Mercedes Wilson pertaining primarily to Title 10 family planning programs in the past. I may have—I suspect that I have discussed adolescent pregnancy, fertility awareness with her from time to time as part of those meetings.

As I recall, my Deputy and I met with Sula Hurley only following the receipt of her grant and discussed their project and what it was, you know, what she would—she was planning it. And we were discussing with her her project.

Q How long have you know Miss Wilson?

A I haven't know her well. But I have known of her for a number of years. I am not sure that I met her prior to coming to the Department, however.

Q How long have you known Ms. Hurley?

A Not long.

[172] Q Less time than Miss Wilson?

A Yes. I'm quite sure I didn't know her before coming to the Department, I don't think.

Q Are you familiar with the Billings ovulation method?

A I have a very surface knowledge of it only.

Q Were you aware at the time that you made the decision to fund FAF that its activities were related to the

philosophy for the practice of the Billings ovulation method?

A What I would have been concerned about, and what I assume the field readers were concerned about, was their activity to encourage postponement of secular activity among adolescents and respect for fertility, resonsibility, those kinds of qualities.

[191] Q According to your programmatic interpretation, what information, if any, could a counselor in a Title 20 funded program provide about abortion?

A They could not – What could they provide?

Q Yes.

A That, again, would need perhaps legal interpretation. If someone wanted to come to me or to any of my staff and they would come to me with sufficient information and a very hard case that they would like to do such and so, but in some detail, exactly what information and what setting or what kind of services and what setting, we would have to have legal interpretation.

In the meanwhile, it's very clear according to the statute that the program employes, the program cannot provide referral, counseling or referral for abortion except when – referral is possible when a parent requests it.

Q Is it your testimony that so far as you are aware, [192] there's been no question raised as to the applicability of Section 2011 that cannot be answered by reference to the language of the statute itself, raised by grantees?

A I did not testify to that fact. What I testified to is that I made it very clear that we would be relying on the statute until we had sufficient program experience to see what kind of guidance was reasonable and helpful, at least to a large number of grantees. In the meanwhile, on a case by case basis with sufficient information for legal counsel to make a determination we would offer guidance to that individual grantee.

Q Have you offered any guidance to any individual grantee to date concerning section 2011?

A I am not aware that any grantee has brought in a special problem with information requesting that kind of interpretation.

Q Are you aware that any members of the OAPP staff are having difficulty answering questions from grantees regarding the issues raised by Section 2011?

A I am aware that the person who is responsible for monitoring of the programs evidently feels that there is a need for and prefers broad guidance or guidelines to individual case by case interpretations and has asked for, repeatedly for [193] that kind of decision by me. And I have not made that decision. I have made it clear that we are not going to make that decision until we know what guidance is reasonable and applicable to enough grantees to warrant additional guidance.

Q Are you aware that other members of the OAPP staff other than Mr. Sheeran believe that their jobs could be better performed if there were further guidance concerning the applicability or meaning of Section 2011?

MR. HIRT: I don't know if there's any foundation for that, but go ahead.

THE WITNESS: Well, I don't know that this is the case. But it would not be surprising since Mr. Sheeran supervises the other project officers who would be responsible for monitoring, if he did not, you know, was not able or was not willing to deal with this issue in this way, it would be understandable that the people who he supervised could have possibly had problems. But they were not brought, as I can recall, directly to my attention.

* * * * *

[311] BY MR. HUNTER:

Q Was there ever a tool developed for the monitoring activity of ascertaining the degree of religious involvement in any of the Title XX grantees?

A I believe that the telephone was used, and I testified to that in the past, the telephone could be used by the Project Officers in order to discuss with any particular grantee the concerns that they may have. I certainly want to make the record clear that conversations between Project Officers and grantees were not limited to some kind of protocol that was initiated by me or that was a policy by the office. So that on an individual basis, whenever that information was necessary, surely one would have expected that the Project Officer would have used the telephone, or done [312] anything else appropriate in order to see, to ascertain whatever information he or she needed.

Q My question was, if you could answer yes or no, was there any protocol or tool developed for the specific purpose of ascertaining the degree of religious involvement of any of the Title XX grantees.

A I can't recall that either Mr. Sheeran's protocol or Freya Sonenstein's protocol that was developed had questions of a religious nature. I do not know. They developed the draft and I can't recall that. However, again I would like to make sure that it is on the record that these particular protocols or tools were developed for special projects in between. The expectation, which I am sure was shared by staff, was that they would be in touch with the grantees and aware of the grantees' activities in all regards concerning the law, so they would have been expected to, without a protocol, to utilize the telephone and other appropriate means of monitoring, for religious monitoring, as well as any other purposes.

Q Did you ever ask Mr. Sheeran or Ms. Sonenstein, or anyone else on your staff to develop a protocol or a tool to ascertain the degree of religious involvement of any of the Title XX grantees?

[313] A I can't recall that I did, because I was not aware that there were particular problems, having been assured by the person who was responsible for monitoring

that he felt that the problems were taken care of or that there were no particular problems. Since none were brought to my attention specifically as existing, I would have had no reason to develop a protocol to call grantees to ask them about their religious involvement.

Furthermore, clearly there would be no reason to expect that that would affect large numbers of grantees in this program since most of them do not have religious affiliation.

Q Did Ms. Sonenstein ever assure you, in those or some other words, that there was no religious involvement in any of the Title XX grantees?

A The person who has maintained the responsibility for monitoring the grantees and maintained the title has been Patrick Sheeran, and since he was well aware of the potential problems and had assured me that he was aware of that, I can only assume that he was maintaining his role in making certain that these kinds of problems did not exist.

* * * * *

[321] BY MS. HUNTER:

Q Again, if you could try to answer the question that I asked, Ms. Mechlenburg. The question that I asked was whether there were any materials that were reviewed and suggestions made in 1982 with regard to the issue of the religious nature of the materials. Do you know of any instance like that? Yes or no?

A I cannot recall. Once again they were reviewed [322] for a number of different aspects, and I could not, without the materials in front of me and the curriculum in front of me and the reports in front of me, recall any specific instance that you might be referring to.

Q Same question, and again I would ask for a yes or no answer to that question, with regard to 1983. Do you know of any instance in which the staff of OAPP – anyone on the staff of OAPP – or any outside specialist dealt

with the issue of the religious nature of materials from any Title XX grantee programs?

MR. HIRT: I think you want to clarify that. Dealt specifically with?

MS. HUNTER: I think it is clear—had any specific response to that specific issue.

MR. HIRT: That is a different question, but go ahead.

THE WITNESS: Was it '83?

MS. HUNTER: Yes.

THE WITNESS: I cannot recall, except I know that the issue of curriculum and the materials in the curriculum has been one which has received attention in my program and that staff members, appropriate staff members, have been aware that potential exists for possible problems[323] in this area, and if the problems did exist, once again this was worked out between the Project Officer and the grantee and they would have conferences and work on any kind of changes that they would feel need to be made.

Deposition Excerpts of
Patrick J. Sheeran,
Director, Division of Program Development and Monitoring in the Office of Adolescent Pregnancy Programs

[Direct Examination by Ms. Benshoof:]

[78 Because of the whole scope of the abortion discussion, because of these parameters, my feeling was and my guidance to grantees was you are better off not discussing it at all. You are certainly in accordance with the spirit of the legislation if it is not discussed at all, and from the point of view of your own reputation, avoid it. In fact, I went so far as saying to grantees you should not even know how to spell the word abortion. Those are the directions they got from me.

Q Did that come from you or anyone who supervised you?

A It was my interpretation, my compromise with myself from the interpretation I gave from the directions I was given from my supervisor.

Q Which supervisor

A Mrs. Mecklenburg.

Q What directions were you given?

[79] A That it was all right to talk about the bad things about abortion; the negative consequences were all right to be talked about; if abortion was discussed as killing and all the negative things about it, that would probably be all right in a prevention program.

Q In other words, Mrs. Mecklenburg stated under the Act in a prevention program, negative things about abortion, such as it was killing, were all right to be discussed but nothing else, and in order to reconcile that with, could I state, your conscience, you said it was better to say nothing at all?

A Yes.

Q Is that a correct characterization?
A That is a correct characterization.

* * * * *

[98] Q Plaintiff's Exhibit No. 6 refers to field readers Who were these field readers and how were they selected?

A This is the result of a process recommended by me and the program staff to conduct the review of applications received. This was the method decided upon by the Director.

Q You recommended that field readers be used to evaluate the grant proposals, and Marjory Mecklenburg accepted this recommendation; is that correct?

A Yes.

Q Who drew up the first list of outside readers to which these grant proposals would go?

A The first list was drawn up by me. Actually, it [99] was drawn up by Barbara Rosengard at my direction to include names of potential field readers submitted by me, myself, Barbara Rosengard, Julianne Davis, and a number or external individuals.

Q Such as?

A Caroline Gaston, director of a school out in Albuquerque, New Mexico; Lois Gatchel, formerly the director of the Margaret Hudson program in Tulsa, Oklahoma, and Denise Shipp from the staff of the American College of Obstetrics and Gynecologists. I think that was the gist of it.

Q How many people did you have on this list?

A On the initial list that we submitted to Mrs. Mechlenburg, there were probably in the neighborhood of 100 people.

Q Had these people had experience with grant evaluation?

A Some did and some did not.

Q Out of this list of 100 people, did you ask that Mrs. Mechlenburg approve the list or in any way change the list? In what way did you submit it to her?

A I submitted the list as a list of recommended readers for the Title 20 review process. She was free, as she knew, to add to or subtract from it in any way. It was [100] her decision.

Q What happened to this list?

A The list was submitted to her. Following the submission, I had no further discussion on it. All I knew was that sometime thereafter, a letter was sent with Mrs. Mecklenburg's signature to a number of readers with a questionnaire asking them if they would be willing to accept the job of reviewing grant applications during July or early August of 1982 and, if so, to send back the application and a copy of their resume indicating also, I believe, if I remember correctly, the type of application that they would wish to review, whether they wanted to review one that was prevention, care, a combination, special consideration.

Q Were these reviewers to be paid?

A Yes.

MS. BENSHOOF: I would like to have these two exhibits marked as Plaintiff's Exhibits 7 and 8.

[Plaintiff's Exhibits 7 and 8 were marked for identification.]

BY MS. BENSHOOF:

Q Mr. Sheeran, you stated that Mrs. Mecklenburg received from you a copy of a list of 100 names. Do you know how many names of readers were ultimately used, how many [101] readers were ultimately used to review grant applications?

A Knowing we needed 72, we had 72.

Q Was the 72 taken from your list of 100?

A Some of them were.

Q How many of them?

A Fifty percent, perhaps. That is a guess.

Q Where did the other names come from?

A The other names were selected by Mrs. Mecklenburg herself.

Q Did any of the staff that had input into drawing up the 100 names with you have input with Mrs. Mecklenburg in drawing up the names which composed about half of the final readers?

A None of those who had input with me in the list submitted.

Q Did you have any discussions with Mrs. Mecklenburg or anyone else at the staff of the Office of Population Affairs about the new list of readers drawn up by Mrs. Mecklenburg?

A I did. I discussed it somewhat with Joe Lampe who composed the June 23rd letter, and it was he who compiled the list for Mrs. Mecklenburg and prepared the letter and application that went out to those readers.

[102] Q You are now referring to Plaintiff's Exhibit 8, a letter dated June 23, 1983 signed by Marjory Mecklenburg?

A Yes.

Q It is your testimony Mr. Lampe took the names given him and wrote this letter?

A Mr. Lampe at Mrs. Mecklenburg's direction was given the names, the final selection she made, and he was asked to draft this letter and to contact the readers to find out if they would be willing to do the job.

Q Did you view a list of the readers to whom this letter was sent?

A Not until afterwards.

Q Did you have any discussions before this was sent with Mr. Lampe or others about the readers?

A No.

Q When did you view the list of readers?

A Mr. Lampe gave the list to Barbara Rosengard sometime after it had gone out, and it was only then that I saw for the first time who the potential readers were.

Q Could you describe those readers to me.

MR. HIRT: I want to go off the record a moment.

[Discussion off the record.]

MS. BENSHOOF: Back on the record, please.

[103] BY MS. BENSHOOF:

Q Mr. Sheeran, if it was part of your job in assembling applications and helping evalute applications for Title 20, why did you not see the final list of readers until after the letter had gone out to them, which was drawn up by Mr. Lampe and signed by Mrs. Mecklenburg?

A I don't know why I wasn't told about or shown the list.

Q Didn't you feel this was unusual?

A Yes.

Q Did you protest?

A No.

Q But you felt it was irregular?

MR. HIRT: Unusual was his testimony.

BY MS. BENSHOFF:

Q Unusual and irregular?

MR. HIRT: You are leading the witness.

THE WITNESS: I felt that my job was to provide the options, and whatever option was selected, it was ultimately going to be her decision.

As to whether or not I should have been told what an option would be, I felt I should have been, but that was not my prerogative.

[104] BY MS. BENSHOOF:

Q When you received a copy of the list of readers after the letter, Plaintiff's Exhibit 8, went out to those readers, I want you to describe to me what your reactions were as to the qualifications of those readers as compared to your original list.

MR. HIRT: Did he have any opinion?

BY MS. BENSHOOF:

Q Did you have any opinion?

MR. HIRT: This is the portion of the final list that was not on his original list.

BY MS. BENSHOOF:

Q The portion of the 72 which you had not originally selected with your group, did you have an opinion as to the caliber, the experience or the qualifications of those readers?

A I did.

Q What was that opinion?

A First of all, most of them I would say were totally unknown to me. Secondly, I was totally unaware of their experience in grant reviewing or adolescent pregnancy programs.

Thirdly, I was somewhat surprised by the inclusion of a number of persons with religious affiliations.

* * * * *

[111] Q Were the ones that you had serious concerns about those whom you described as religious?

A Some of them.

Q You stated that Mrs. Mecklenburg selected one-half or around 36. Could you give an estimate out of this 36 as to how many would be religious, as you described?

A I am not exactly sure I said that. I said she selected about half of the 100 that I submitted, and that is approximate. I have not counted them. I am giving you the best I can recall.

Q Of the readers unselected by you and selected by her, could you give an estimate of the percent of those who were religious?

A Of those selected by her, 30, 40 percent.

Q You mentioned that you were concerned about the qualifications of many of them. Your question was many

of them meaning not selected by you but the qualifications of the ones selected by Mrs. Mecklenburg.

Out of this group, about what percent did you have serious questions about their qualifications, and I am not referring to just the religious ones. Out of the group of the 72 selected by her, about what percent did you have [112] serious questions about their qualifications for this particular job?

A Ninety percent of them.

Q And you stated 30 or 40 percent of them probably had religious affiliations?

A Yes.

Q Did you have any discussions with anyone as to how this group was formed, or do you have any independent knowledge of how this group was formed?

A You have two questions there. No, to the second question. No, I do not have any knowledge of how the group was formed. Discussion was informal with staff, as I mentioned earlier.

Q Were there any members of the staff who knew how this group was formulated?

A I believe that Joe Lampe was the only one and Ernie Peterson were the only two who knew how the final selection was made.

Q Did Mrs. Mecklenburg have any staff discussion with anyone before the letter of June 23rd went out to the readers about this final selection of a list of 72?

A Not that I can recall.

* * * * *

[120] Q Did any comments from the HHS reviewers note the religious content in any proposal?

A Yes.

[121] Q Who?

A I cannot remember exactly who. I would be guessing, but I do remember they were noted.

Q Where were they noted?

A In the internal review process, we had certain forms that we used to summarize what was done, and we had meetings, with the director and, in both instances, some of the comments were noted and presented.

Q Were there any guidelines on religion given to the HHS reviewers who were looking at the comments and the scores?

A None.

Q What was the nature of the comments?

A As I recall, some of the reviewers' or readers' comments were critical of certain kinds of organizations, critical of the fact that some organizations did not manifest Judeo-Christian philosophy.

Q Did or did not?

A Did not, and didn't present an ethical, moral approach to teaching family life, sex education, and the like.

Q These are comments that were put on by the external readers or the internal HHS readers?

[122] A These were comments put on by the external readers and noted by the internal reviewers.

Q Are you aware of any written or oral communications that came through your office that certain groups should not be funded under this Act?

A Would you please repeat your question.

Q Were you made aware or given any written or oral communication such as a memorandum that certain groups should not be funded under this Act?

A Yes.

Q Could you describe that communciation and what it said.

A I was given an oral presentation on certain documents external to the organization that listed a number of agencies that this administration should consider not funding.

Q Who read this to you?

A Mrs. Mecklenburg.

Q Was this documents from the *Conservative Diges:* by Richard Viguerie?

A Yes.

Q Was it entitled "Defunding the Left?"

A Yes.

Q Was the impression you received from her that the [123] organizations listed in that articles were ones that would not receive funding under this grant program?

A I don't think that was her point.

Q What was the context of her reading this memo?

A I understood it to be to advise me that there was such a document in existence and that perhaps we should be aware of it and doing an internal review and internal assessment of the applications.

Q Who else did she read this to?

A The only other person I have heard who told me it was read to was Dr. Patricia Thompson.

Q Did you have a discussion about this with Dr. Patricia Thompson?

A Yes.

MR. HIRT: It is well beyond 6:15, and you have gone beyond the scoring.

BY MS. BENSHOOF:

Q In your opinion, was this list of organizations read to you because Mrs. Mecklenburg agreed with Mr. Viguerie that the administration should not fund certain organizations listed?

A I don't know why she read it to me. I would only be guessing if I were to say yes, and I would be guessing [124] if I said no. It was read to me, and I was not told to follow it or not follow it. It was given to me as a guide.

Q But it was given to you in a professional context in your job; isn't that correct?

A That is correct.

Q It was not given to you at a party or after hours?

A No.

Q It was given in your professional capacity as a program officer evaluating grants nationwide from various groups; isn't that correct?

MR. HIRT: I don't think he has testified to that.

BY MS. BENSHOOF:

Q Is that a correct assessment?

A Yes.

Q Do you remember any particular groups that were on that list?

A Yes.

Q Could you list the ones that you remember?

A Urban Institute, Urban League, National Family Planning and Reproductive Association, Planned Parenthood, American Planned Parenthood Federation of America, I guess. These are just example of some that I can remember.

Q Did she call you into her office to read this or [125] was this read at a meeting of your staff? How did this reading come about?

A She called me into her office to read it.

Q That was the agenda of her calling you into her office?

A Yes.

* * * * *

[176] Q Yesterday you testified that you were particularly concerned about the qualifications of some of the readers selected by Mrs. Mecklenburg that made up the ultimate group of readers. In particular, you stated that there was a number who you identified as religious types. In reviewing the readers' comments and raw scores, did you see an association between the type of readers and the evaluation given on proposals from religious organizations?

A In some cases, yes.

Q Can you describe that correlation?

A To the best of my recollection, which is limited to just a few cases that I would tend to list as examples, the scores were very low and the accompanying comments not [177] appropriate.

Q Could you explain what cases, how low were the scores, and why weren't the comments appropraite?

A The scores were low and, I believe, if I remember correctly, that the comments indicated that the proposed program or the organization—sometimes both—didn't manifest sufficiently Judeo-Christian principles or the furtherance of the promotion of chastity and abstinence that the legislation seemed to call for.

Q So what you are stating is that some of the reviewers made comments that they gave low scores because the religious content was too low on particular applications?

MR. HIRT: That is not his testimony, certainly.

BY MS. BENSHOOF:

Q Would you agree with that statement?

MR. HIRT: I object to the form of the question.

MS. BENSHOOF: I will rephrase that.

BY MS. BENSHOOF:

Q Is what you are stating that some reviewers gave low scores to particular grant applications accompanied by comments which indicated they assessed too little Judeo-Christian content in the grant program?

A Yes.

[178] Q You also stated the words "chastity" and "abstinence". Are you referring to those two words as pertaining to comments by some reviewers, those two words in a religious context?

A I am referring to them in the context of the legislation, where these words are used.

* * * * *

[184] Q Mr. Sheeran, when Caroline Gaston, Lois Gatchell, Denise Shipp, and Marty Bogan came to Washington to act as outside consultants, they were under your direction; is that correct?

A Yes.

Q In reviewing the grant applications, in reviewing the raw scores, and in reviewing the readers' comments, were they in daily communication with you?

A Yes.

Q Did you report to Mrs. Mecklenburg about their daily discussion or were they in constant communication with her about this review process?

MR. HIRT: That is two questions. Why don't you rephrase it? You are asking him a compound question and I think that is entirely inappropriate.

BY MS. BENSHOOF:

Q Did they speak to Mrs. Mecklenburg about this review [185] process?

A No.

Q The person who supervised them and to whom they went with questions was you, is that correct?

A Yes.

Q To the best of your knowledge, was their only communication with Mrs. Mecklenburg in writing?

A I don't understand the question. Communication by whom?

Q You stated earlier that these outside consultants wrote a letter commenting on the review process to Mrs. Mecklenburg, a letter which you had not seen. To the best of your knowledge, is that their sole communication with Mrs. Mecklenburg?

A No.

Q What other communications did they have?

MR. HIRT: Without getting into the substance, so we can keep that problem still present. In other words, if they had any other conversations—

THE WITNESS: I know that Mrs. Gatchell hand delivered the letter to Mrs. Mecklenburg and talked with her in person.

BY MS. BENSHOOF:

Q Other than that occasion when she hand delivered the [186] letter and talked to her in person, do you know of any other occasion where Mrs. Gatchell or any of the other—

MR. HIRT: You are asking another compound question. I am going to objeçt to each one of these. I want you to ask one question at a time.

BY MS. BENSHOOF:

Q Other than that occasion, did any of the other outside reviewers speak to Mrs. Mecklenburg?

A Oh, I am sure they spoke to her informally, but I have no knowledge of the substance of their conversations or the scope.

Q Did Mrs. Gatchell tell you why the letter was hand delivered?

A Yes.

Q Why?

MR. HIRT: Without getting into the same substantive problem, if you can, explain.

THE WITNESS: To call to Mrs. Mecklenburg's attention her concerns on the review process.

BY MS. BENSHOOF:

Q Had she expressed those concerns to you as her boss?

A Yes.

Q What has she expressed to you?

[187] MR. HIRT: I have the same objection as I stated before. We are getting back into the same problem in terms of communications.

BY MS. BENSHOOF:

Q You stated that she had stated concerns to you as her boss about the internal review process, is that true?

A No, about the external review process.

Q I will correct that. You stated that Caroline Gaston had presented concerns to you about the external review process, is that true?

A Yes.

Q Had any of the other three people stated concerns to you about the external review process?

A Yes.

Q Were those concerns stated to you orally or in writing?

A Mostly orally.

Q In this process of working with the outside consultants and reviewing the grant proposals and the outside readers comments and scores, was there any discussion, written or orally, about the American Civil Liberties Union?

A Yes.

Q And what was that?

[188] MR. HIRT:Let's go off the record for a minute. We want to take a short five minute break to discuss this. We will be back.

(Short recess)

BY MS. BENSHOOF: On the record.

MR. HIRT: You have a question pending.

(Record read—lines 17 thru 23 previous page)

THE WITNESS: In regard to some of the comments of readers, the question was raised something to the effect, as best I can recall, what would happen if the American Civil Liberties Union got hold of this.

* * * * *

[221] Q During the internal review process and prior to the time that any letters went out announcing the grants, did HHS investigate the religious contents of the proposed programs?

A Yes.

Q How?

A I was directed to make a number of phone calls, which I made, to some of the applicants who were about to be funded. I couldn't tell them that they were about to be funded, but phone calls based on the premise that if you receive funds.

Q Who did you call?

A I called all of the Catholic applicants who had a prevention component in their proposal, as well as prevention applicants themselves.

Q What did you tell them?

A I raised the question that if they did receive funds [222] under Title XX, did they understand that these funds were not to be used for teaching of morals,. dogmas, religious principles of that particular denomination.

Q Did you tell them anything about the kind of facilities or the religious affiliation of people to whom these programs could be held in or directed to?

A No, I did not.

Q What assurances did you get from what programs?

A I got virtually the same assurances from all of them, including the Catholic Charities of Arlington and Catholic Family Services of Amarillo, Catholic Social Services of Wayne County, St. Mary's Hospital in Kansas City, that the programs they would conduct with funds from Title XX would not be used for teaching religious classes, Confraternity of Christian Doctrine classes, or such religious education programs.

Q Were these assurances in writing or over the telephone?

A They were over the telephone.

Q Did you make a record of those telephone calls?

A I do not believe that I did. I may have, but I doubt it. It was under pressure at the last moment, and I had been asked to do it and come back with a verbal report that it had been done, with an assurance that if funds were given [223] they would comply with this directive.

Q Mr. Sheeran, you read Plaintiffs' Exhibit 12, is that correct?

A Yes.

Q In this Mrs. Mecklenburg discusses a project officer who discussed religious involvement with Catholic Charities of Arlington and Catholic Family Services of Amarillo, Texas. Are you that project officer?

A Yes, I am.

Q This document states that you were concerned there might be some religious content to the proposed curriculum and the context and location of services proposed to be provided. What were your concerns?

A I was concerned, particularly in the case of the Arlington proposal, that there was at least an insinuation that these programs would be conducted in parochial schools or in conjunction with Confraternity of Christian Doctrine classes and thereby be just a continuation of what Catholic schools and Confraternity of Christian Doctrine programs traditionally do.

Q Could you describe what Confraternity of Christian Doctrine is?

A Confraternity of Christian Doctrine, the programs, [224] of course, are religious education programs for Catholic students attending public schools, courses that are offered usually once a week that are somewhat related to what other denominations call a Sunday School.

Q Are issues relevant to sexuality, abortion, marriage, chasity, abstinence, and intercourse commonly taught in the Confraternity of Christian Doctrine classes?

A Yes.

Q Would you say that they are an integral part of Catholic theological doctrinal education for youth?

MR. HIRT: If he is qualified to give an opinion on that, he can, for what it is worth.

BY MS. BENSHOOF: Since you were a priest –

THE WITNESS: Yes.

BY MS. BENSHOOF:

Q You stated that you were concerned about the religious content in the proposed curriculum. This is a different question than where they are. What religious content were you concerned about?

A In this particular one, the Diocese of Arlington, I was concerned at the time that it was nothing more than what I termed, and I went with the terminology, nothing more than a glorified Confraternity of Christian Doctrine program.

[225] Q That is how you characterized it?

A Yes.

Q To whom?

A To Mrs. Mecklenburg and Mr. Peterson, and Mary Ann Hamilton.

Q You characterized it as a glorified version of a Confraternity program?

A A glorified Confraternity of Christian Doctrine program.

Q A glorified –

A Confraternity of Christian Doctrine program.

Q You then expressed this concern to Catholic Charities of Arlington?

A I expressed it to Mr. Peterson and Mrs. Mecklenburg and Mary Ann Hamilton, in our office.

Q When you expressed this to them, were you asking for instructions?

A Yes.

Q What did they instruct you to do?

MR. HIRT: Why don't we leave it at Peterson and Mecklenburg for now?

MS. BENSHOOF: Okay.

BY MS. BENSHOOF:

[226] Q What did Mr. Peterson and Mrs. Mecklenburg ask you to do about this?

A Nothing at the time.

Q Which time was this?

A At the time I raised the concern.

Q When was that?

A Oh, several weeks before the—during the internal review process and several weeks before the decision to fund was made.

Q Had any lists been drawn up recommending different projects?

A Not at that time.

Q You stated that they asked you to do nothing at that time about this religious doctrine. Did they ask you to do something at a later time?

A They didn't ask me.

Q Did they ask anyone else?

A They asked Mary Ann Hamilton to read the document.

Q Read what document?

A The application of Dioscese of Arlington.

Q For what purpose?

A To assess or to determine whether the concerns I had raised had any merit.

[227] Q Who was Mary Ann Hamilton?

A Mary Ann Hamilton was an attorney serving the office as an expert consultant to Mrs. Mecklenburg.

Q Did she render an opinion to Mrs. Mecklenburg about the Catholic Charities proposal?

A I don't know.

Q Did anyone communicate with you after Mrs. Mecklenburg gave that proposal to Mary Ann Hamilton?

A Mary Ann Hamilton communicated with me.

Q What did Mary Ann Hamilton say to you?

MR. HIRT: Could we go off the record for a minute?

(Record temporarily suspended)

MR. HIRT: Just for the record, we are going to authorize Mr. Sheeran to state what Ms. Hamilton said. It is not clear to me entirely whether Ms. Hamilton was acting in a capacity as a lawyer or not, but I am willing to allow her advice to him in the context of this issue being directly raised, to be stated for the record. This is, after all, before the litigation, as well. So you can go ahead and answer what she said.

THE WITNESS: Ms. Hamilton had some of the same concerns that I had about the proposed program, that it might, indeed, be a program that would be operated in Catholic schools [228] or as part of a Confraternity of Christian Doctrine program that could very well entail the teaching of morals and dogmatic principles, and agreed that it was a concern as far as this particular proposal was concerned.

BY MS. BENSHOOF:

Q Did she state to you that she related her concerns to Mrs. Mecklenburg?

A No, she did not.

Q so you were not aware whether or not there was any written or oral communication between Mary Ann Hamilton and Mrs. Mecklenburg about the Catholic Charities curriculum?

A I am not aware.

MR. HIRT: Not curriculum, the application.

MS. BENSHOOF: Application materials.

THE WITNESS: I am not aware there was any discussion between them subsequently in regard to the application.

BY MS. BENSHOOF:

Q This was prior to the funding decision, is that correct?

A Yes.

Q Catholic Charities of Arlington was funded, isn't that correct?

Yes.

[229] Q They were funded prior to the time you called them to get assurances about not promoting religion or conducting religious activities, isn't that correct?

MR. HIRT: That is certainly not correct and you know that is not correct. They couldn't have been funded with money several days before the grant awards were issued, when he called them, because they didn't know whether they were going to be funded or not, and they hadn't been funded yet.

THE WITNESS: No, the phone call was made in between my discussion with Ms. Hamilton and the actual, on September 30th, when the funding decision was made.

BY MS. BENSHOOF:

Q So the phone call was made after the funding decision went out to the recipient or before it was made within HHS?

A The phone call was made before the final funding decision was made. The list of applicants for funding had been decided upon, but was subject to change up to the last minute. The phone call was made to insure that this applicant would be in compliance and would not use the funds to teach religion. Having had that assurance, then the final decision was made to fund the program.

Q So that the Catholic Charities of Arlington was on the final funding list of Ernest Peterson. Then you made the [230] phone call for the assurances?

A Yes.

Q Then you related those assurances to Ernest Peterson?

A Yes.

Q About how long was your telephone conversation with Catholic Charities of Arlington asking for these assurances?

A Two or three minutes.

Q What kind of assurances did they give you on the phone?

A That they would not use the funds to teach religion in Catholic schools or teach Confraternity of Christian Doctrine programs.

Q Did they make any statements that they would not conduct these programs in church facilities?

A No.

Q Did they make any statements that they would change or modify their curriculums?

A No.

Q Were you satisfied with their assurances?

A Yes.

Q What other calls did you make to get assurances?

A To Catholic Family Services of Amarillo, Texas; [231] St. Mary's Hospital of Kansas City, Missouri; Catholic Social Services of Wayne County, Michigan; St. Margaret's in Dorchester, Massachusetts.

Q Were these all on the final list compiled by Ernie Peterson?

A Yes.

Q How long, about, did each phone call to these different potential grantees last?

A Two to three minutes.

Q do you remember who you spoke to at each of these different projects?

A As best I can recall, I spoke to Betty West in Arlington, to Nancy Bushard-Fink at St. Margaret's. I think it was Drema Raupp—R-a-u-p-p, I believe—at Catholic Social Services of Wayne County, Michigan. I think it was Martha Lauder or Larry Watson—I am not sure which one—at Catholic Charities of Amarillo, Texas, and a gentleman at St. Mary's Hospital in Kansas City, and I just can't recall his name at the moment. It escapes my memory.

Q Did anyone other than you call to get assurances about the religious content?

A Not as far as I know.

MS. BENSHOOF: I would like to have this marked as [232] Plaintiffs' Exhibit 13.

(The document referred to was marked Plaintiffs' Exhibit No. 13 for identification)

BY MS. BENSHOOF:

Q Mr. Sheeran, I am showing you a copy of the grant proposal from Catholic Charities of the Diocese of Arlington, Virginia. I gave you some selected pages. I just have a few questions to ask you about this. Are you familiar with this document?

A I have seen if before, yes.

Q Prior to making the phone call to get assurances as to the religious content, did you then re-review the document?

A No, I did not.

A Who directed you to make the telephone call?

A Mrs. Mecklenburg.

Q I would like you to turn to the page which is Table A, marked 30. Did you or anyone at HHS ask Catholic Charties what it means to, which is one of the goals of their program, to-quote-clarify values of self, family, church, and community which relate to sexual behaviors?

A No, we did not.

Q On the next page, under Goals and Objectives, Roman [233] numeral III, did you or anyone else ask Catholic Charities to explain what is meant by the goal-quote-to develop community support for a program of family centered sex education in private schools and religious education classes?

A No, we did not.

Q I am turning to page 13, which has a document No. 36 at the top. In the middle of the page, the paragraph entitled "The Settings", it states-quote-Programs will be held in Catholic schools and religious education classes using church facilities. Did you or anyone at HHS inquire of Catholic Charities of Arlington, Virginia, why only Catholic institutions were utilized in this program?

A No, we did not.

Q Turning to page 18, Document No. 41, did you or anyone at HHS inquire what is meant by-quote-This

group will preview the program and assist in developing elements consistent with community/church/school/parent/teen views?

A No we did not.

Q The next page, page 19, the "Manuals" in the middle of the page, why were these manuals listed in the grant proposal? Did anyone ask why they were listed?

MR. HIRT: Which question do you want?

BY MS. BENSHOOF:

[234] Q Did anyone at HHS, including yourself, ask why these manuals were listed in the grant proposal?

A No, we did not.

Q Do you know why they were listed in the grant proposal?

A These were some of the concerns that we raised, that I had raised internally, and the fact that these materials were available—at least they were showing that—since they had another program in the diocese before, and these were some of the materials that they were going to use. I did not consider it an exhaustive list, but I did note the nature of the titles.

Q When you say you noted the nature of the titles, what do you mean by "the nature"?

A Well, I was familiar with the one, particularly, the one "Reverence for Life and Family", which has been used in several dioceses in the United States in Catholic sex education programs in parochial schools. It was written specifically for that type of purpose or for a parochial school religious setting, so, yes, I was familiar with that, and hence my concern about this particular program in the settings, whether it be parochial schools or Confraternity of Christian Doctrine settings. That was the basis for my concern.

[235] Q As a priest, had you used these manuals?

A No.

Q Do you believe that a class which uses these manuals discriminates against Jews?

MR. HIRT: You are asking for his opinion?

MS. BENSHOOF: Yes.

THE WITNESS: It could.

BY MS. BENSHOOF:

Q Do you know whether the Catholic Charities of Arlington or any other grant recipients' letters of recommendation were checked out?

A Would you please repeat the question? I wasn't concentrating.

Q Do you know whether Catholic Charities of Arlington or any other grant recipients' letters of recommendations were checked?

A No, they were not.

Q Could you turn to the next page of that exhibit?

A I just want to clarify one thing. "Checking out", I am interpreting that in the sense of checking them for authenticity, that they were written by genuine, real people. In that sense, nobody checked them for that purpose.

Q Did anyone call them to check them for further details [236] on the applicant?

A No, they did not.

Q So in both seses, no?

A Right.

Q I am turning to the next page of that exhibit, which is a letter on stationery of Good Shepherd Catholic Church, signed by Reverend Gerard Creedon. Were you yourself aware or was anyone at HHS aware that Reverend Gerard Creedon was the Executive Director of Catholic Charities of Arlington, Virginia?

A No, we were not.

* * * * *

[258] Q Are you aware that Catholic Charities of Arlington, Virginia, had the grant announcement from HHS announced by the Bishop who approved its submission prior to submission to HHS?

A Yes, I am.

Q How are you aware of that?

[259] A They told me. they showed me a clipping, I believe, from the newspaper during a site visit.

* * * * *

[260] Q Are you aware of the Bishop of Catholic Charities media announcement in church bulletins about the program?

A Yes, I am.

Q Did you approve those particular media announcements?

A No, I did not.

Q You question anyone about those media announcements?

A Yes.

Q Who?

[261] A Betty West, a Director.

Q What did you say to her?

A I wanted to know how they had promoted or advertised, marketed their program, how they let people know what they were doing or going to be doing, and then she told me about the announcements in the church bulletins, which I thought was an adequate promotion publicity activity.

Q Did you believe the announcements in church bulletins would go to persons other than Catholics who received the church bulletins?

A Possibly some.

Q Who?

A People pass church bulletins around. Sometimes they get passed around from one person to another. Sometimes there are non-Catholics at Catholic services

and, sure, they would have an opportunity of reaching some non-Catholics.

Q But it would be fair to say, wouldn't it, that the main purpose of Catholic church bulletins are to reach the parishoners?

A Yes.

* * * * *

[283] Q You testified earlier that Mrs. Mecklenburg read to you as a guide a list of organizations published by the Conservative Digest that she blacklisted for Federal funds is that correct?

MR. HIRT: I object. That is a mischaracterization of his testimony. Page 121 to 145 states, "She called me into the office to read it."

It is different from your term that she read it to him. It is a mischaracterization to state "blacklist" because that did not come out of Mr. Sheeran's mouth.

MS. BENSHOOF: I will rephrase the question because I haven't had an opportuity to read the transcript.

BY MS. BENSHOOF:

Q Are you testifying that Mrs. Mecklenburg did read you a list which you characterized earlier as a guide, a list which was published by the Conservative Digest, is that correct.

MR. HIRT: He did not say she read it to him as such. He can answer it.

THE WITNESS: She called me to her office and she called to my attention a list from which she read the names of several organizations which this particular periodical or [284] digest should not be funded by this Administration.

BY MS. BENSHOOF:

Q To your knowledge, were any title programs not funded because they were on this list?

MR. HIRT: I object. I don't think he has a foundation for asking that question since he did not make the decisions.

THE WITNESS:You mean Title 20 applicants?

BY MS. BENSHOOF:

Q Yes.

A In the service area with which I dealt and following the raw score method, I cannot recall any that were not funded because they were on the list.

Q Do you recall any other area of funding, if you have personal knowledge of that?

MR. HIRT: What do you mean by any other area of funding?

MS. BENSHOOF: Under the Title 20 program: Research, prevention and care.

MR. HIRT: Research is another issue. I want a continuing objection to your characterization.

THE WITNESS: What I described in my service area included care and prevention and combinations of both. As [285] far as research is concerned, it is my understanding that one was not funded.

BY MS. BENSHOOF:

Q Because it was on this list?

A I don't know whether it was on the list. All I do know is that it had a high score that was passed over and it wasn't funded.

Q What was the name of the organization or applicant?

A Urban Institute in Washington, D.C.

Q Was the Urban Institute on the list given to you from the Conservative Digest or read to you?

A Yes.

Q Who makes the research decisions? Strike that question.

Who was the program person in charge of making the research decisions under Title 20?

A Dr. Patricia Thompson was the program person involved in making the recommendations, but the decisions as in the Care Service Area were made by Mrs. Mecklenburg and Mr. Peterson.

Q Are you personally aware whether or not the Urban Institute was recommended for funding?

A Yes, it was.

* * * * *

[307] Q Mr. Sheeran, could you turn to Exhibit 4, which was introduced at your prior deposition?

A Yes.

Q Did you prepare this outline?

A Yes, I did.

Q This outline was for which conference?

A This was for essentially the first conference, the one on November 17 or 18, or whenever in November it was, and also to be used in the combination, as part of the program for the combination projects as to prevention on the second and third of December.

Q In point 3 on that exhibit, could you just explain what is meant by your one sentence? What did you mean by joint efforts between church and Federal Government?

A I was addressing the issue of promoting chastity, as the legislation called for, and I wanted it to point out that the churches, traditionally, had been involved in this [308] area, and the Government was now getting into it, and that while the churches had not been successful, there wasn't going to be any big guarantee that the Federal Government was going to be successful, and perhaps by jointly working from the same place, it was worth a chance to see if it could work.

Q Turning to point 11, on the next page, I have just a couple of questions.

Were any specific guidelines given to explain the subject matter of point 11 to the grantees, or was this it?

MR. HIRT: You mean something physically given, or orally?

MS. BENSHOOF: Physically or orally, at the orientation conference.

MR. HIRT: Other than what is said here?

MS. BENSHOOF: Yes.

THE WITNESS: Essentially not. this was a summary. This I regarded as a talking point. Nothing was given over and above, beyond what was contained in my talk.

BY MS. BENSHOOF:

Q When you stated in point 11 that you may not use these funds "to teach or promote religious or moral teachings," what did you mean by moral teachings?

A Specifically dogmatic, Biblical, moralistic points [309] of view that had a theological base, the promoting of theological moral issues in terms of dos and donts from a commandment point of view.

Q What religious teachings on the issue are a normal—and I am using that in quotes—part of Sunday School, religious education, or CCD classes, as referred to in your first paragraph in number 11?

A I had personally interpreted the legislation, while waiting for a policy in that matter. I personally interpreted the situation rather conservatively to give grantees guidance on what not to do, and how to keep out of trouble, and to ensure that they would not use funds obtained from us for teaching of the normal courses that, say, for example, Catholics have taught for years in parochial schools or confraternity of Christian doctrine programs, or what Protestant churches traditionally teach in Sunday Schools.

Q So that by the first paragraph you meant that the programs could not teach the kinds of teachings that would have been "a normal part of Sunday School religious orientation or CCD classes"?

A Yes, I didn't want them to use the money to teach what they normally teach as a part of the regular religious ongoing program.

[310] Q You said, in the second paragraph, "prevention courses, however, may be based on, or related to these principles, but the teaching or promotion of the principles themselves with funds from Title 20 is not permitted."

What do you mean by that paragraph?

A Broadly speaking, I find it hard to find any kind of educational or value type of program that doesn't have some kind of basic religious or ethical foundation, and while a sex education class may be completely separate from a religious class, it might relate back to it in terms of principles that are embedded philosophically or theologically or religiously in another discipline.

What they may try to promote from sex education may have emanated from some principle founded way back in some religion, without naming a particular one.

Q You phrased this that you personally thought.

Was any policy ever issued by HHS regarding the guidelines set forward in paragraph 11 which we have been discussing?

A Never.

Q Did you discuss your interpretations with anyone before writing these two paragraphs?

A I raised these issues and several others as matters [311] requiring policy decisions, and I discussed this as one of several points of view to be considered by the Director, and requested guidance.

In the absence of guidance, I was forced, on my own, to use this as a guideline in dealing with the grantees.

Q Did you seek advice from anyone else on writing these two paragraphs?

A Yes, with the people on my staff, the program people.

Q But no one else in a supervisory capacity?

A Oh, yes, I had gone to Mrs. Mecklenburg and Mr. Peterson with this outline, and requested guidance in regard to several aspects, together with several other issues, but I was not given any guidance.

Q This outline was passed out at the orientation conferences, is that right?

A I don't believe so. I think I used this as my own guide.

Q As a discussion leader?

A As a discussion leader, yes.

Q Did the question ever arise at the orientation session, when you were a discussion leader, as to whether prevention courses be held in church facilities?

A I do not recall that the question of holding the [312] courses in church facilities ever arose. It may have.

Q Did the question ever come up, either by the recipients themselves, or was it raised by the discussion leaders, about the situation where Title 20 recipients, parents and teenagers, bring up religious issues themselves?

A Oh, yes.

Q Could you describe in your answer the discussions?

A Well, the discussions, by and large, centered around abortion, family planning, birth control and how these matters could be resolved or addressed within the context of the prevention program.

Q My question was, how did the conference address the situation where recipients brought up religious issues in relation to the program. Could you answer that?

A The main religious issue was, I guess, centered on abortion. And I think I testified previously, our approach was do not be able to spell the word. Forget it. This was the approach I took. Don't get involved with it one way or another, for your own safety.

Q So the grantees were instructed not to say negative or positive things about abortion, is that it?

A Yes.

MR. HIRT: I don't think the proper thing was [313] instructed.

THE WITNESS: We encouraged them not to address it one way or another.

BY MS. BENSHOOF:

Q You answered my question about religious issues by raising the abortion issue. Did you consider this to be a religious issue?

A In some ways, yes.

Q Explain.

A Well, in the discussions that we had, or in the orientation meetings, we had groups representing various religious denominations.

Q Which ones?

A Catholic Charities of Arlington, Virginia. Catholic Social Services of Detroit, and Brigham Young University were in the first meeting. The issues of abortion, from a moral point of view, did arise, and how it should be addressed and handled in an education program was of concern, and there was considerable discussion as to whether it should be ignored, or whether it should be dealt with as a topic, or what one should do when the issue came up, as to what values could or should be attached to it.

The general feeling among these groups was that if it [314] was raised by a participant, whether it be a teenager or a parent, it should be addressed, but no religious or moral value should be attached to it.

The general feeling seemed to be for any moralistic or religious implications on abortion, the questioner should be encouraged to go back to his or her family and resolve that in a family environment.

Q Did the participants at the conference make comments to you that they believed it was a religious issue?

A Oh, yes.

Q Did they agree with one another on the religious position of abortion?

MR. HIRT: Who is "they"?

MS. BENSHOOF: The three he mentioned.

MR. HIRT: Did all three express agreement on the issue as to whether it is a religious issue, the abortion?

MS. BENSHOOF: I am asking whether, theologically speaking, they agreed on the question of abortion.

THE WITNESS: I don't know whether they agreed theologically on all aspects of it. In general, they all

seemed to have a general belief of unanimity that abortion was wrong.

BY MS. BENSHOOF:

[315] Q In a religious sense?

A In a religious sense, but the—in the approaches of how to deal with it, they seemed to be more together. They identified with each other on how they would deal with the subject if it arose, and felt they would refer it back to the family.

Q Were any Jewish organizations represented among those successful grantees attending the orientation processes, conferences?

A I don't believe we had any Jewish grantees, per se, although some Jewish organizations were part of a network, or part of networks that constituted some grantees.

* * * * *

[320] Q I would like to call your attention to number 9, on Plaintiff's Exhibit 4, which we have been discussing, your recommendation on abortion.

Do you feel that your recommendation contained in number 9, which you stated was that you believed was a conservative approach, inhibits the free speech of grantees and recipients?

MR. HIRT: I object. He said it is guidance to them. It is not instructional.

I will let him answer, though.

THE WITNESS: As I look at it now, yes, I do.

BY MS. BENSHOOF:

Q How?

A Well, essentially, if I tell them this, that they cannot discuss abortion, pro or con, I am in a way impeding [321] their freedom of speech, but on the other hand, as I look at this, I regard the legislation as prohibiting the discussion on abortion, and if they had willingly applied for funds, they knew what the rules were going to be, and as I understand it, the person with the gold makes the rules.

Q In other words, your testimony is that it is the legislation that inhibits free speech, not your guidelines?

A That is the way I thought, and that is the way I see it now.

* * * * *

[323] Q So this Programmatic Expectation was used at the second and third orientation sessions?

A I think it was used at all of them. We oriented all of them on the number of grantees funded and how to get our programs started and management involved. All of that was part of the program shared with all of the participants at all three meetings.

Q I would like to direct your attention to page 2 of this exhibit under "Do's and Don'ts." Number "e." states "use the family/churches/professionals."

What does this mean? is this "do," or "don't"?

A It is a "do." Essentially what is meant by that heading is to encourage grantees to get the community involved. I think the legislation, if I can remember it correctly, talked about the importance of community [324] involvement and getting professionals and the family and churches, and this was something that we wanted to encourage the grantees to do in order to get the support necessary to get the programs off the ground and hopefully to give them the prestige necessary to make them successful.

Q Did you point out to the grantees how the Act specified involving churches?

A Yes, to the extent that having support from ministers and clergy in general would seem, or it seemed to us to be an important way of having the program accepted.

Q That is not my question. My question is did you take the legislation, the statute itself and in going through the "do's" and don'ts" point out in the legislation itself how or where church involvement was specified or encouraged?

A No, I did not.

Q You said use the family churches and professionals. In what capacity?

A In an advisory capacity to, first of all, let them know that the grantee had received funds for a particular program, be it Care or Prevention or both, to brief them on the ingredients of the program, to elicit their support and to advise them on how the program can best meet [325] the needs of that particular community.

Q Is there any particular reason why you use the word "churches" and did not include synagogues?

A No. I intended to lump all churches and synagogues together.

Q It is a generic term?

A Yes.

Q Mr. Sheeran, I'll show you a copy of the legislation itself, and in particular a section discussed, "What Grant Applications Have to Include." Are you familiar with point (b) of the grant requirement section which discusses involving a description of how the grantee will involve churches?

A Yes.

Q Was this requirement one of the factors or the factor causing you to write section (e) of Plaintiffs' Exhibit 17?

A Yes.

* * * * *

[330] Q Who made the ultimate decision for continuation grants for 1983?

A Mrs. Mecklenburg and Mr. Peterson.

Q Was there any monitoring or discussion of the religious content of the program prior to the making of the continuation grant?

A None.

MR. HIRT: Was it monitoring or discussion?

BY MS. BENSHOOF:

Q Was there any discussion of the religious content of any of the programs prior to the making of the continuation grants?

A No.

* * * * *

[337] Q Earlier you termed this as "erroneously put in the grant application." Describe what you mean by the word erroneously?

A What they have told me; that they unintentionally put in 12 months because they thought from previous experience that you had to reapply every 12 months and they didn't realize they could have put down 60 months, or 36.

Most of the people put in 30 or 36. They felt that the body of the text was sufficient evidence to indicate their intentions to pursue funds in the future years.

Q Were you the project officer for this grant?

A Yes, I was.

Q Did you believe that the grant application reflected an intention to have continued funding for more than one year?

A Yes, I did.

Q You stated that they then reapplied as a new grantee for 1983, is that correct?

A Yes.

Q They were the only applicant for the State of Arkansas, is that correct?

[338] A Yes.

Q Were the 1983 applicants for grants scored?

A Yes.

Q Was the raw score or standardized score method used for the 1983 grantees?

MR. HIRT: Objection. Which one are you asking for?

MS. BENSHOOF: For the new ones. They applied as a new grantee. And I asked were they scored, and he said yes. And I said which scoring method was used, raw or standardized.

MR. HIRT: Okay, fine.

THE WITNESS: Raw score.

BY MS. BENSHOOF:

Q Did they have a higher score than some of those funded?

A Yes, they did.

Q Who was the project officer for the grant?

A I was last year during the first year of the program.

Q Had you a site visit prior to the time they came up for their new grant application?

A Yes, I had.

[339] Q Did you make a site report?

A Yes, I did.

Q Did you find that the project was making progress?

A Yes.

Q Did you write a favorable site visit report?

A Yes.

Q Did other people find this to be a successful project?

MR. HIRT: What do you mean, participants?

BY MS. BENSHOOF:

Q In the process of making a site visit and report on projects, you discussed the project with various people?

A Yes.

Q In this particular instance, who did you discuss the project with, and what were their comments to you?

MR. HIRT: I'll let him answer the first question first.

THE WITNESS: I discussed the project with a number of people at the University.

BY MS. BENSHOOF:

Q Of Arkansas?

A Yes—in various capacities and some people in [340] the community, and, of course, with staff after I had returned. And I had a number of favorable letters concerning the project.

I was told the project was one of a few, was the only one I believe in Arkansas, the only federally funded project in

health in Arkansas that had received the State Award for Excellence.

Q How many other projects did you make site visit reports on?

A Some 17.

Q Is it your opinion that the University of Arkansas project was one of the most outstanding?

MR. HIRT: I'll object on the basis of relevance. How does the University of Arkansas have any relevance? It is not identified as a religious or unreligious grantee.

MS. BENSHOOF: I'm laying a foundation for the funding of this project.

BY MS. BENSHOOF:

Q In you experience how would you rate the project run by the University of Arkansas?

A In relation to other prevention projects, that is, I would say that it was well run; and as far as I was [341] concerned, was meeting the requirements of the law, and it was a project that focused primarily on teaching teachers or providing teachers with the training necessary to conduct prevention programs in local schools. It had in it all the safeguards necessary in terms of local committees that review curricula materials that would be used and had provided access to parents, had provided parents access to these materials so that they could see them beforehand and decide whether to allow their children to participate or not.

Q Was this project one of the projects that you had originally recommended to be funded?

A Yes.

Q Was one basis for this recommendation the fact that Arkansas has the third highest teenage pregnancy rate in the country?

A Yes.

MS. BENSHOOF: I'll ask the reporter to mark Sheeran Exhibit 18.

(Sheeran Exhibit 18 was marked for identification.)

BY MS. BENSHOOF:

Q I show you Sheeran Exhibit No. 18 for [342] identification. Have you ever seen this document dated June 16, 1983, labeled "A Formal Complaint"–

A Yes, I have.

Q Let me finish my sentence–"Formal Complaint to Margaret Heckler Regarding the University of Arkansas Program"?

A Yes.

Q When did you first see this complaint?

A Back in June of 1983.

Q Who gave you this complaint?

A I'm not sure exactly whether it came to me directly or Mrs. Mecklenburg, but it did arrive in my office.

Q Did you have a discussion with Mrs. Mecklenburg about this complaint?

A Yes, I did.

Q What was the substance of that discussion?

A As to whether this was really a lawsuit or not. She was of the opinion that this was a lawsuit and I was of the opinion that it was not, and that was the end of the discussion.

Q Did she recommend that you take any further action in regard to this complaint?

[343] A No.

Q Do you know whether or not any lawyers were consulted in regard to this complaint?

A I have no idea.

Q Do you know whether or not anyone else within your office was asked to respond to this?

A No.

Q Are you personally aware of any other complaints from people in Arkansas about the program at the Univer-

sity of Arkansas directed to either Mrs. Mecklenburg or H.A. Jess?

A Yes.

Q Letters or complaints?

A Yes.

Q Describe what letters or other complaints you are aware of?

A We received, and I'll make it clear that I received some letters. Mrs. Mecklenburg received others. Some of us received letters from the same people, four or five individuals, mostly in Arkansas, from the State of Arkansas, although there was one from Texas, I believe, complaining about the programs, mostly the sex education program that was conducted by the University of Arkansas.

[344] The complaints seemed to center around the fact that the curricula used by the University of Arkansas had been developed by Planned Parenthood of Memphis, Tennessee, and therefore was immoral and was not in accordance with the Title XX legislation.

These people asked, or wrote several letters asking that the University of Arkansas be defunded, and that their tax dollars not be used for the teaching of immoral or—immoral or God-less type of programs that were destined, ultimately, to distort the morals of young people in the State of Arkansas. There were about four or five mostly from the State of Arkansas.

At the same time we did receive numerous letters from other folks in the State of Arkansas, mostly teachers and social workers and parents, and some politicians, extolling the program and talking about the necessity for it.

Q Did the letters complaining about the program specifically complain that the program was without religious content?

MR. HIRT: Did they so state in those words?

BY MS. BENSHOOF:

Q Did they use words—you used the word "God-less" in your testimony. Did these letters specifically [345] complain about the lack of religious content in the University of Arkansas program?

A Mostly the letters address the use of the curriculum, because it was developed by Planned Parenthood—regardless of how good it might be, it was still a sham and included other things in it which was, they felt, a way of getting to their children, and children would be the worse because of participating in such a program.

Q Was it your understanding that these people felt the curriculum violated their religious beliefs?

A Yes.

Q Did you originally approve this curriculum in making the grant recommendation in 1982?

A Yes. I did not approve the curriculum, but I pointed out that the grant application did contain this curriculum. I pointed out it had been developed with Title X of the Public Service Act funds and that Mrs. Mecklenburg was aware of it, because of the fact that I had pointed out what was developed by Planned Parenthood of Memphis was funded from funds of another department or another agency of the Department of Health and Human Services. I had recommended because of that it was acceptable curriculum.

[346] Q You stated that there were these letters complaining on certain grounds about this program. Did you turn those letters over to the Department of Justice in response to the subpoena in this lawsuit?

A No, I did not.

Q Are they under your possession or control?

A Yes, the whole file in the State of Arkansas is in my control.

Q So that those letters are still in the State of Arkansas file in HSS?

A They should be.

Q Did you give copies of all the letters to Mrs. Mecklenburg?

A Yes, I did.

Q Did she respond to them, or did you?

A I responded to all that I received, or nearly all. Perhaps there was one or two that I didn't. I cannot say as to whether she responded to all. I know she did respond to some.

Q Why do you think that the University of Arkansas project was not funded in 1983?

MR. HIRT: You mean in his personal opinion?

MS. BENSHOOF: Yes.

[347] MR. HIRT: I'll object, but I'll let him answer.

THE WITNESS: I honestly believed that they weren't funded in '83 because I think our office caved in to the pressure from a few people who had not only written us and raised so much controversy about it, but also had written to a number of Members of Congress about the same problem, and that it would be both embarrassing to Congress, certain Members of Congress, and to our office if we continued to fund a project that used these types of materials.

Q When you say these types of materials, you are referring to the materials that did not contain the ethical or religious or moral values that the people seemed to demand?

MR. HIRT: Objection. That wasn't his testimony. It was not that the materials lacked religious content.

BY MS. BENSHOOF:

Q You testified it was your understanding that the curriculum violated their religious beliefs?

MR. HIRT: His testimony was that he believed that it did.

[348] MS. BENSHOOF: All right.

Mark this as Sheeran Exhibit 19.

(Sheeran Exhibit 19 was marked for identification.)

BY MS. BENSHOOF:

Q Are you familiar with this letter?

A Yes.

Q Was a copy given to you?

A No.

Q How are you familiar with it?

A I'm familiar with it because Mr. Underwood had told me that it had not been funded and that he had written to them, or was writing to them to tell them that they had not been funded.

Q I would like you to read the last sentence in the second paragraph, and you tell me whether that is true.

A "The reviewers did not score your application high enough to permit funding with the limited funds that we had available."

Q Is that true?

MR. HIRT: I don't think you laid a foundation as to whether that is true or not. Director Mecklenburg and Deputy Director Peterson made the decision.

[349] MS. BENSHOOF: Score. We are talking about score, objective. He said he gave them a score or that he they had a score.

MR. HIRT: If he knows. I don't think he said that.

BY MS. BENSHOOF:

Q They were given a score, is that correct?

A Yes.

Q A high score?

A Yes.

Q Is the sentence you just read a truthful sentence?

A No.

MS. BENSHOOF: I would like to mark this as Plaintiffs' Exhibit 20.

(Sheeran Exhibit 20 was marked for identification.)

BY MS. BENSHOOF:

Q Are you familiar with that letter?

A No, I don't think I've ever seen this letter. There is no date. I may have, but if I have it is in my file in Arkansas.

Q Based on the content of the letter would you [350] expect that it would be in the file in Arkansas, in the Arkansas file?

A Yes.

Q Okay. Thank you.

After the 1983 continuation grants were made and the new awards were made in 1983, was there any leftover money in the budget?

A In 1983?

Q Yes.

A This has nothing to do with the University of Arkansas?

Q No, we are off that.

A Yes.

Q Who was this money given to?

A Some of it wasn't given to anybody. It just went back into the general fund as I understand it.

Q How much are we talking about?

A Couple hundred thousand dollars.

Q We are talking about a couple hundred thousand dollars left over. What happened to this money?

A It went back into the Treasury of the United States, as I understand it.

Q Were any additional awards made to grantees?

[351] A No. There was some money apart from that left over which I understand was given to some grantees, given to a few grantees.

Q What money are you now talking about?

A As best as I can recollect, there was some money left over, some money left over from the continuations and the

new grants that were made. And as I understand it, they were uncertain how much they had left.

They thought they had less than they actually had. They had 200,000 left over that they never did give out, but what they had left over in between, some grantees were given extra money just to spend it up just in the hope they could get it all appropriated or get it awarded before September 30, '83.

Q What grantees were given this extra money?

A As I understand it, St. Ann's in Hyattsville was one, Hyattsville, Maryland. I believe Bringham Young, and there were several others. I had gotten the list a day afterwards and on the side of my page I put down pluses and minuses. Minuses indicated those that have been cut, and the pluses those that got additional money. I can't remember.

Q You mentioned St. Ann's and Brigham Young. Do you know what amount was given to the groups?

[352] A I can't remember Bringham Young, but St. Ann's was 30,000 or 35,000.

Q Is there a term for this kind of money? Is it called "sweep up" money?

A I never heard the term used myself. I am not exactly sure of what it means. I don't know.

Q Did St. Ann's or Brigham Young ask for this additional money?

A Not as far as I know. They were in the first column of grantees that I described earlier. They came in with no problems or no additional funds. I have to say no, they were not.

Q They did not request any additional funds?

A That is correct.

Q Who decided to give this extra money to those two grantees and the others?

A I guess Mr. Peterson and Mrs. Mecklenburg.

Q Are you aware of any criteria that was used to award this extra money?

A No.

Q Are you aware of any reaction from Brigham Young or St. Ann's upon their receiving this money?

A Yes.

[353] Q Are you aware of any reaction on the part of St. Ann's?

A Yes, I am.

Q Describe the reaction you are aware of from St. Ann's upon receiving this extra $35,000?

A They came into our office and asked why they received this additional amount of money, and said frankly they didn't know what to do with it, they didn't know how they could spend it.

Q Who came in your office and said they didn't know what to do with the money?

A A sister or nun; I can't remember her name.

Q Who did she say this to?

A Barbara Rosengard and Donald Underwood.

Q Do you know how HHS reacted to her questions, in surprise?

A I really don't know.

Q Do you consider it unusual that they gave money to programs that had not requested it without opening up the application process to all grantees or to new ones?

A Yes, I do.

Q It is your testimony, isn't it, that no guidelines were issued as to what to do with this left-over money?

[354] MR. HIRT: He testified he didn't know what criteria were used.

BY MS. BENSHOOF:

Q Were you given any guidelines as to people who received the extra money as to what to do with the money?

A Not as far as I know.

Q Do you know whether or not Sister Betty Ann—is that it?

A That name is familiar, yes.

Q Do you know whether or not Sister Betty Ann received an answer as to what she should do with the money?

A I don't know whether she received an answer or not.

Q Do you know whether or not Bringham Young University received any guidelines as to what to do with the extra money?

A I do not know.

Q Do you have any personal opinion as to why some particular grantees were given unasked for left-over money?

MR. HIRT: I object. Since he doesn't know what criteria were used, how could he give an opinion?

[355] BY MS. BENSHOOF:

Q You said objective criteria. Do you know any non-objective criteria that were used?

A No.

Q Do you have any opinion as to that?

MR. HIRT: Objection.

THE WITNESS:No, I don't.

BY MS. BENSHOOF:

Q It was your understanding this was a decision made solely by Mr. Peterson and Mrs. Mecklenburg?

A Yes.

Q The regular evaluation people like yourself were not involved in the process of distributing the extra money?

A We were not.

Q Do you have any understanding as to why they picked those particular programs?

A No.

* * * * *

[360] Q Why wasn't Family of Americas funded in '82?

A It received a very low score. It wasn't even under consideration for funding.

Q Mr. Sheeran, I would like to direct your attention to the first page of Exhibit 22.

(Sheeran Exhibit 22 was marked for identification.)

BY MS. BENSHOOF:

Q Refer to Paragraph No. 2, which is a document [361] discussing the Family of Americas Foundation issued by the Office of Population Affairs. Paragraph No. 2 states: "The outside reviewers which we utilized applied the criteria stipulated in the RFA and determined that the application was one of the most meritorious submitted."

Mr. Sheeran, you just testified that in 1982 they received a very low score and their program had not changed in 1983. Could you explain paragraph 2 of the first page of Exhibit 22?

MR. HIRT: He testified it had not changed significantly.

THE WITNESS: I would be guessing, and I would be speculating to begin to interpret what it means.

BY MS. BENSHOOF:

Q Does it surprise you?

A Yes.

Q Do you know who prepared this?

A No.

Q But it was someone from the Office of Population Affairs?

A I have no idea. I have never seen it before.

Q Do you know whether or not the video tapes which Family of Americas said would be used in their programs [362] were previewed before the national grant was awarded to them in 1983?

A No, I do not know.

Q Was the religious content of the Family of Americas program ever discussed at HHS to your knowledge?

MR. HIRT: Objection. There has been no foundation laid that it has any such religious content.

BY MS. BENSHOOF:

Q Was it religious involvement?

MR. HIRT: Same objection. The only involvement I'm aware of is that Ms. Wilson has written to the Pope.

MS. BENSHOOF: Shall we put in all 500 exhibits from FHF?

(Discussion off the record.)

MS. BENSHOOF: I would like to have this document marked Sheeran Exhibit 23.

(Sheeran Exhibit 23 was marked for identification.)

BY MS. BENSHOOF:

Q Mr. Sheeran, I'm showing you a document marked Sheeran Exhibit 23, which is a list of activities, 1983 activities proposed as ongoing and current of the Family of Americas.

[363] Could you read the seventh paragraph of this document for the record?

A "Providing continuous communication on all our national and international activities with the newly founded Pontifical Council for the Family at the Vatican."

Q Were you aware that Family of Americas was involved with the Vatican?

A Yes.

Q Do you consider the Vatican religious?

MR. HIRT: Foundation.

BY MS. BENSHOOF:

Q Is the Pope Catholic?

A Yes.

Q Is the Vatican religious?

A Yes.

Q Do you consider this religious involvement?

A Yes.

Q Was the religious involvement of Family Foundations discussed at HHS prior to their grant award in 1983?

A I don't know what was formally discussed. I have no idea what was discussed in the decision-making process. Informally there were several discussions about who they [364] were and what they were doing.

Q When you say informal discussions, are you referring to discussions about the religious content?

A No, I'm just talking about discussions with lower staff members like myself who were not involved in the decision-making process.

Q Could you describe those discussions?

A We were aware and have been aware for years of the activities of Family of Americas when it was previously called Womb USA, and the promotion of fertility awareness, in particular family planning, and their involvement particularly with the Catholic Church, and the reference to secure funding both nationally and internationally for a particular method of family planning and the education of people in this method.

There was some concern that the application was just a continuation of the same thing, the promotion of the Billings Method of family planning and its promotion primarily to, I think they call it Fertility Awareness for Parents and Adolescents. And they would be aware of bodily functioning and be convinced to use it as a more healthy, moral-type of approach. That was the concern.

Q Was there a concern that the Billings Method [365] of Ovulation involved also in the teaching of religious doctrine?

MR. HIRT: Objection. There is no foundation.

MS. BENSHOOF: I would like to mark this as Exhibit 24.

(Sheeran Exhibit 24 was marked for identification.)

BY MS. BENSHOOF:

Q Mr. Sheeran, I'm showing you something marked as Sheeran Exhibit 24, which is a page from the grant application of the Family of Americas Foundation. I'm referring to the statement in the—second sentence which states: "It is not only a method of birth regulation but also a philosophy of procreation and an orientation to sexual freedom and responsibility."

Do you know what that sentence means?

A I think I do.

Q Could you tell me?

A Well—

MR. HIRT: What it means to him as opposed to the writer of it?

MS. BENSHOOF: This is a grant application.

MR. HIRT: Yes, but he can give only his own [366] personal opinion as to what it means to him as opposed to the author?

A I know what it means to me. It says essentially that the Billings Method is not only birth control, but—the big thing is what comes after the but—the philosophy of procreation. That philosophy is that sexual activity is to be engaged in primarily for purposes of causing pregnancy or procreating, creating on behalf of God is the essential meaning behind procreation. Theologically that is what it means. That is what it means to me. So it is a philosophy.

Q It is a religious philosophy?

A Yes.

Q You stated earlier you had training as a priest?

A Yes.

Q Were you ever trained about the Billings Method and the philosophy of procreation?

MR. HIRT: It is a compound question. Let him answer. I'm tired of objecting to compound questions.

THE WITNESS: The Billings question came after my time. As a priest in the Billings Method on the philosophy of procreation, yes.

[367] MS. BENSHOOF:

Q Are you aware of any public official such as a Senator or Representative that contacted HHS on behalf of Family of Americas?

A Yes.

Q In regard to their grant?

A Yes.

Q Who?

A I cannot remember exactly, but I do remember that there was, that they received, that letters came from Members of Congress on behalf of Family of Americas recommending favorable consideration of their grant application.

Q Would one of these letters have come from Senator Denton?

A Could be.

Q To whom were these letters addressed?

A I can't remember.

Q Would the letters be in the Family of Americas' records, or in the correspondence file of Heckler or Mecklenburg?

A They should be in both.

Q That would be the common business practice of the agency?

[368] A Yes.

Q Do you know if these letters were responded to?

A I don't know.

Q You stated you had discussions about Family of Americas' philosphy with other officials, with other HSS officials. Did they share your same understanding?

MR. HIRT: Understanding of what? What the grant application meant?

MS. BENSHOOF: Yes.

THE WITNESS: I think generically they did. On a broader of view, I tended, because of my background, to be more analytical of the philosophy.

MS. BENSHOOF: Here is a 2-page exhibit. Please mark it Exhibit 25 for identification. (Sheeran Exhibit 25 was marked for identification.)

BY MS. BENSHOOF:

Q Mr. Sheeran, I'm showing you an exhibit marked Sheeran Exhibit 25, which consists of two letters, one from the Tennessee Family Office and one from Coastal Bend Council of Governments, both concerning the fact that these governmental agencies would not approve or recommend funding [369] of the Family of Americas Foundation.

Are you familiar with these two letters?

A No, I'm not. Ruth Sanchez Dirks and Don Underwood.

Q Is it unusual to fund an application that gets disapproved by their local, that has two refusals to recommend from local governmental agencies?

A It is somewhat unusual. It is sometimes done and sometimes not.

Q Mr. Sheeran, in your previous testimony you stated that you called some grantees and spent a few minutes on the phone with them, and asked them for assurances about not having religious content in their programs.

Am I characterizing your previous testimony correctly?

A Yes.

Q Do you know whether this was done with the Family of Americas Foundation?

A I would not.

Q Who would be the person who would know that answer?

A Ultimately Mrs. Mecklenburg, Mr. Peterson, or Ruth Sanchez Dirks.

[370] Q Mr. Sheeran, I would now like to direct your attention to site visits.

Did you do site visits on Title X grantees?

A Yes.
Q How many site visits did you make?
A Seventeen, approximately.
Q Were these 17 different grantees?
A Yes.
Q So that you made a site visit to 17 different grantees funded under Title XX?
A Yes.
Q Were these grantees funded in '82 or '83?
A All were funded in 1982. All but one were funded in '83.

* * * * *

[381] MS. BENSHOOF: As Exhibit 28, I would like this document marked, the typed and handwritten copy of the Catholic Charities site visit.

(The document referred to was marked Sheeran Exhibit No. 28 for identification.)

BY MS. BENSHOOF:

Q I am showing you Plaintiff Exhibit 28, which is a typed copy and a handwritten copy of your site report to the Catholic Charities of Arlington, Virginia. It is our understanding that you will examine these two documents to see that they conform to one another; is that your understanding?

A Yes.

[382] MR. HIRT: The typewritten copy is prepared by plaintiff's counsel to ease the ability to read the handwritten copy.

BY MS. BENSHOOF:

Q If you could take a look at your handwritten one, what are the typed portions from?

A The typed portions are from—let me go back. Before I went out on a site visit I sent out a letter to each. It was the same format to each grantee. It listed 14 or 16 items that I would be looking at. Many of them before I got there had a chance to type the answers and what we

have got here is the typed portion. What is the status of the project? That is one of the questions and they typed in the responses. I have taken that page and rewrote it. It was easier to read my handwriting.

Q The typed portion was typed by people in the project and the handwritten part written by you?

A Yes.

Q Could you just read for the record the paragraph of this exhibit that I am pointing out to you and then state whether or not this is one of the portions that the project itself prepared?

A Families attend a course together. The title of [383] it is Parents and Teens Together. Families attend the course together. Presentation (By Pastor) on Community and Religious Values Relating to Sexuality. This answers questions raised by parents and teens and involves them in a dialogue.

Q That was prepared by the people at Catholic Charities about their program?

A Yes.

Q Look at Exhibit 29, which is an outline of Program and Curricula of Catholic Charities. Have you ever seen this curriculum?

(The document referred to was marked Sheeran Exhibit No. 29 for identification.)

THE WITNESS: No, I have not.

MS. BENSHOOF: Could you please turn to page 5, up above at 245, it is called Section 4, February 22, 1983.

(The document previously marked Sheeran Exhibit No. 29 for identification was withdrawn.)

MS. BENSHOOF: Mark this document 29.

[384] (The document referred to was marked Sheeran Exhibit No. 29 for identification.)

BY MS. BENSHOOF:

Q Mr. Sheeran, I am showing you a curriculum from Good Shepherd dated Janurary 18, 1983. Have you ever seen this curriculum?

A No.

Q Could you turn to page 5, labeled Section 4?

A Yes.

Q Could you read for the record and subheadings under Discussion Questions?

A "Discussion Questions-Parents"

"What are you telling—"

Q Above that.

A "7:30-Father Creedon lectures on values of the Church and community. Parents discuss how Catholic values fit into their lives.

"What are you telling your teens about premarital sex? morality? consequences?

"Does this fit with presentation given by Fr. Creedon?

"Do you think the Church gives you the help and [385] support you need?

"How could the Church be more helpful?

"Are you comfortable explaining your values to your children?"

Q Go on.

A "RE: Sex

"What are your parents' ideas about premarital sex?

"Are they telling you? Do you just know how they feel?

"What part does religion play in your making decisions about sexual matters?

"Do you get enough guidance from your Church about sexual behavior?"

Q You did not approve this curriculum; is that correct?

A That is correct.

MS. BENSHOOF: Would you please mark this as 30? (The document referred to was marked Sheeran Exhibit No. 30 for identification.)

BY MS. BENSHOOF:

Q Mr. Sheeran, have you ever approved the two [386] curriculums put into evidence here as Plaintiff's Exhibit 30?

A No.

Q Have you ever seen them?

A No.

Q Could you look at the bottom of the second page where it says "Program to be Planned, By St. Anthony's Advisory Group"?

A Bottom of the page?

Q Here (indicating).

A Thank you.

Q Do you know what it means?

A I have no idea.

Q Okay.

So it would be correct to state, would it not, that you did not see specific curriculum for the programs taught in the Catholic Charities Prevention Program?

A I did not.

Q Is that true of other programs?

MR. HIRT: Is it what?

BY MS. BENSHOOF:

Q True of other programs, of specific curriculums? Of other grantees' programs? That is that he did not see [387] specific curriculums of other grantees' programs?

A I had not seen most of the other prevention grantees curricula.

Q Mr. Sheeran, you did a site visit to SEMO?

A Yes.

MS. BENSHOOF: I would like to put in a typed and handwritten copy of the site visit report by Mr. Sheeran to SEMO Association.

(The document referred to was marked Sheeran Exhibit No. 31 for identification.)

BY MS. BENSHOOF: I have a question about page 1 of your site report. You state here literature is conservative. What do you mean by that?

A This one?

Q No, we used our typed copy.

A Okay.

Q If it is different in your handwriting, tell us.

A They gave me copies of some of the materials that they had or that they had been using with explanations from the Director and Larry Campbell and some staff members with whom I talked, that the literature was not the—or did not include some of the more fanciful sexual oriented type of [388] materials that some agencies have been accused of using and that they had developed this very carefully with input from and approval by people from the local community who tend to be very conservative.

Q Were you aware whether approval had been given by Fundamentalist Churches?

A Yes.

Q You were aware?

A Yes.

Q And yes, approval was given by Fundamentalist Churches?

A Yes.

Q How was approval obtained from the Fundamentalist Churches?

A As I remember, from what they told me, that they had their Outreach workers and some of the professional staff contact local pastors or religious leaders and explain to them the nature of what they were trying to do and how they would look at what they wanted to present would reflect the mores of that particular community, it appears to me that what they were trying to do is to teach parents how to become the sex educators of the children and to get parents really involved and committed to it, they felt that the [389] pastor's approval was one way of enticing parents to participate.

Q When you said the materials reflected the community mores, does that include the religious mores?

A Yes.

MS. BENSHOOF: Could you mark this as Plaintiff's Exhibit 32?

(The document referred to was marked Sheeran Exhibit No. 32 for identification.)

BY MS. BENSHOOF:

Q Are you familiar with this letter dated October 19, 1983 to marked as Sheeran Exhibit 32?

A Yes.

Q Do you know who this letter was from?

A I am pretty sure it is from Gary Campbell, the Director.

Q I would like the record to reflect this is a letter from Mr. Campbell and we will find the second page imminently.

MR. HIRT: Okay.

BY MS. BENSHOOF:

Q Mr. Sheeran, the letter states, "Our researchers in St. Louis, Dr. Richard Thurman and Dr. Glenn White, feel that [390] our success in delivering sexuality education through fundamentalist churches, if continued, could result in our becoming a model program for this type of delivery mechanism."

Were you aware that the programs were presented physically at the churches?

MR. HIRT: There is no foundation for that, is there?

BY MS. BENSHOOF:

Q Were you aware where the programs were held in SEMO?

A I thought I was.

Q Where did you think they were held?

A If I remember correctly, they told me they had a number of centers that the agency operated in a number of counties and they had 17 or 00 that number sticks out in

my mind for some reason—where they brought people together in some kind of community center or health-related facility, and it was my understanding that the bulk of the educational programs were held in community centers like that.

Q Is it your testimony, therefore, that you were not aware that any programs were held in fundamentalist churches?

MR. HIRT: Same objection as to foundation.

[391] BY MS. BENSHOOF:

Q You testified that you were told the bulk of the programs were held in community health centers.

Did you know where the rest were held?

A No, I did not.

Q Were you aware whether or not any were held in fundamentalist churches?

A I was not.

Q What does it mean to you, this phrase in this letter to you, "Through fundamentalist churches"?

MR. HIRT: Now or when he read it?

MS. BENSHOOF: Either.

THE WITNESS: I felt at the time that it meant the delivering of educational programs with the blessing of fundamentalist churches. I haven't had the time to consider it to be the delivery of the service in the actual church facilities.

MS. BENSHOOF: What exactly is a blessing?

MR. HIRT: What does he mean by that in the context of the statement?

THE WITNESS: With the encouragement, understanding and approval of the local churches, more than just physically being there.

[392] BY MS. BENSHOOF:

Q Did you also understand that they would be leaders in facilitating setting up the program?

A No, I did not.

MS. BENSHOOF: Off the record.

BY MS. BENSHOOF:

Q Mr. Sheeran, did you do a site report and site visit to the Catholic Family Services of Amarillo, Texas?

A Yes.

MS. BENSHOOF: Mark these as Plaintiff's 33, please.

(The document referred to was marked Sheeran Exhibit No. 33 for identification.)

MS. BENSHOOF: Could you mark this as Sheeran Exhibit 34?

(The document referred to was marked Sheeran Exhibit No. 34 for identification.)

BY MS. BENSHOOF:

Q Mr. Sheeran, we have marked for the record as Plaintiff's Exhibit 33 a copy of the Site Evalution Report you made on Amarillo, Texas, and as Sheeran Exhibit 34, four [393] pages from the Progress Report and Continuation Application from the Catholic Family Services from Amarillo, Texas.

Are you familiar with Plaintiff's Exhibit 34?

A Yes.

Q I would like to direct your attention to the last page of that document which has the number 4023 at the top. This document, as you will see in the listing entitled 223, 32, 316, refers to the fact that the Title XX funded Prevention Programs are taking place in the CCD classes.

Were you aware of this?

A No, I was not.

Q Do you feel that this conflicts with your guidelines presented at the orientation session discussed earlier which stated that such programs should not be given or part of CCD classes?

MR. HIRT: I object. I don't think there is a foundation of what went on during those classes. A one-line description is not a very good description. We don't know what was actually taught in that class or presented?

BY MS. BENSHOOF:

Q Do you feel that based on this Progress Report HHS does not know what went on or was taught?

MR. HIRT: How can he state for the entire HHS? he [394] can answer what he knows.

BY MS. BENSHOOF:

Q You were the program officer in charge of this grantee?

A Yes.

Q Based on this Progress Report and the Continuation Application, would you know whether or not the Title XX programs supplemented or supplanted the CCD classes?

MR. HIRT: Objection. I don't know what supplemented or supplanted means.

Go ahead and answer.

THE WITNESS: I would not know whether the programs offered in the manner stated here were part of, supplanted or added to the CCD program.

BY MS. BENSHOOF:

Q In your site visit to Amarillo, did you visit any program given at a church?

A No, I did not.

Q Did you review any of the materials used by them in their programs?

A If I remember correctly, they showed me some of the materials they used. There were just a few things that I was able to look at just very superficially.

[395] Q Did you find out how participants in the program, for the program, were contacted?

A No, I did not.

Q Catholic Charities of Amarillo, Texas was one of the programs which you had originally recommended not be funded; isn't that correct?

A Yes.

MS. BENSHOOF: Please mark this document No. 35 for identification.

(The document referred to was marked Sheeran Exhibit No. 35 for identification.)

BY MS. BENSHOOF:

Q Mr. Sheeran, I am showing you Plaintiff's Exhibit 35 which is page 1 from the Grant Application of Catholic Family Services of Amarillo, Texas.

Could you just read for the record the Official Mission Statement on page 1 of the Grant Application?

MR. HIRT: Asked and answered. Go ahead.

THE WITNESS: "Catholic Family Services, Inc., like the church of which it is a part, fosters individual freedom and liberty and endeavors to prevent the causes of bondage and oppression; designs and renders services to resolve the [396] poverty and misery of the oppressed; emphasizes the truth of Christ through which a loving God makes Himself available to all persons; draws from their hearts the love and concern that is there for each other."

It is signed O.M. Calhoun.

BY MS. BENSHOOF:

Q Keeping that exhibit in mind, I would like to give you Exhibit 36.

(The document referred to was marked Sheeran Exhibit No. 36 for identification.)

BY MS. BENSHOOF:

Q Have you ever seen this press release which I believe was an appendix to the Progress Report?

A Yes, I have.

Q This press release which was an appendix to the Progress Report for the Grant Program states at the end: "The Adolescent Pregnancy Care and Prevention Program is a welcome addition which will provide new opportunities to carry out the mission of Catholic Family Service."

When you made the site visit, did you or anyone else ask how this mission statement was being carried out?

A No, we did not.

[397] Q Was this ever discussed in your presence by yourself with other HHS officials?

A No.

Q Do you know whether you or anyone else at HSS ever followed up the statements made in this newspaper article about the Adolescent Pregnancy and Prevention Program and its mission in Texas?

A No, I did not. I do not know if anybody else did.

MS. BENSHOOF: Please mark this document Exhibit 37.

(The document referred to was marked Sheeran Exhibit No. 37 for identification.)

BY MS. BENSHOOF:

Q Mr. Sheeran, I have just shown you Plaintiff's Exhibit 37 which I believe was an article appended to the Progress Report of Catholic Family Service.

Have you seen this article?

A I can't remember having seen this one, no.

Q The Progress Report submitted to HHS was one of the factors evaluated in determining whether or not a grant would continue; isn't that correct?

A Yes.

[398] Q I would like to point out the phrase in this article that states, "Catholic Family Service, Inc. of Amarillo has received a quarter million dollar Federal grant, part of which will be used as a home for unwed mothers."

I am skipping five paragraphs—"Because of religious doctrine, Catholic Family Service suggests adoption of babies born to young unwed mothers."

Did you or anyone else at HHS discuss this part of the Progress Report?

A No.

Q Were you aware that the Catholic Family Service of Amarillo was not approved by the Panhandle Health Systems Agency?

A Yes, I recall now that they were not approved.

Q Do you know why?

A No, I have forgotten why. I knew at the time. I had forgotten that was one of the reasons I had not recommended it, too. I had forgotten about it.

BY MS. BENSHOOF: I think that is it.

MR. HIRT: I want to ask him about Exhibit 35.

BY MR. HIRT:

Q I am going to ask you a few questions to clarify certain of your testimony. By way of introduction so the [399] people understand, you have you own attorney, Mr. Rodney Oppman, so he can make objections on your behalf.

I am now exclusively the attorney for HHS. I will be asking you questions and Mr. Oppmann can object to any questions as well as counsel for plaintiffs can object.

Start with Exhibit 35. Take a look at it. Refer to the clipped paragraph and read that. Maybe you should read that paragraph into the report since you read the prior one.

A "Although CFS is associated with the Roman Catholic Church, its policy is to serve all persons in neat regardless of faith. In fact, Catholics make up a relatively small percentage of the population and approximately 80 percent of our clients are non-Catholic."

Q Mr. Sheeran, from looking at that quote which you read as well as the longer quote which Ms. Benshoof had you read, can you form any conclusion as to whether the Catholic Family Service of Amarillo would or would not promote its religious views in its Grant Application?

A No, I can't.

Q You can't form a conclusion one way or another; is that what you are saying?

A Yes.

* * * * *

[488] Q Did Ms. Mecklenburg ever make any inquiries as to the religious nature of any of the programs which sought funding?

MR. HIRT: The programs or the entities?

MS. HUNTER: Programs.

MR. HIRT: By "programs" I assume you mean proposed Title XX programs?

MS. HUNTER: Correct.

MR. HIRT: I just want to be sure the question is clear.

THE WITNESS: Programs. The only one that I can [489] recall is the Catholic Charities of the Diocese of Arlington, which I had previewed myself and presented.

BY MS. HUNTER:

Q At that time was there a discussion of possible religious activities in the Title XX funded program from the Catholic Charities of Arlington?

MR. HIRT: I obviously will let him answer, but I think we are getting back into stuff that has already been fully explained by Mr. Sheeran before the process issue came up.

THE WITNESS: I raised some of the pros and cons of it at the meeting, the concerns I had about the use of Catholic schools to at least conduct a program, some of the materials that they intended to use, and I was concerned about the involvement of CCD, the Confraternity of Christian Doctrine, and the things surrounding that. I was also concerned about the other side of the coin that I pointed out, that their proposal seemed to be rather, perhaps, superambitious. They proposed to do certain things in Catholic schools, and I thought to myself if I know anything about Catholic schools or the pastors, their chances of being able to conduct the program in schools might not be as easy as they had indicated, that the pastors might very well, [490] say that we have been running this thing for a long time, we don't need you – good-bye – so I

pointed that out, as well. Both sides were pointed out to Mrs. Mecklenburg.

BY MS. HUNTER:

Q Was was her response?

A At the time, none. There were no responses. The concerns were there, and some other people chimed in on the concerns, but at this point in time, as I said before, no decisions were being made. This was, as I called it at the time, a futile exercise that we went through, and it was a planning process to demonstrate that we could never arrive at decisions that way, nor conduct the whole internal review process in this way.

Q Were there any concerns raised by Ms. Mecklenburg as to religious activities as to any of the other programs which were discussed at these meetings at this point in the process, other than Catholic Charities of Arlington?

A Not that I can recall.

* * * * *

[495] Q Now, between the time of the meetings that you described that were discontinued prior to September 1, 1982, and the date of the final funding decisions on September 30, 1982, how frequently were you personally in contact with Ms. Mecklenburg concerning the 1982 Title XX grant applications?

A Every day.

Q And approximately how much time every day?

A Sometimes it would be two or three times a day for ten or fifteen minutes, sometimes once a day for a half hour.

Q You testified earlier that at a certain point there was raised the question of religious involvement on the part of certain of the Catholic affiliated organizations which were applying for grants, is that correct?

A Yes.

Q And you had discussions with Ms. Mecklenburg concerning that point, is that correct?

A Yes.

[496] Q Can you tell me when those discussions on that topic began?

A I think they began originally during the process that was discontinued and again during a process that I conducted and eventually in the process that Mr. Peterson conducted in the last week.

Q And what was the content of your discussions with Ms. Mecklenburg on that point?

A The concern I had was, in particular, about Catholic Charities of Arlington, and some of the others, that I felt that there was possibly some indication in the proposals that they intended to use the funds for teaching of Catholic doctrine in either parochial schools or in the Confraternity of Christian Doctrine programs, which is outside of the parachial school system, but intended for young people going to public schools.

Q What was Ms. Mecklenburg's response or what did she say during those conversations?

A Well, she heard me. At one stage she or Mr. Peterson or both handed over the proposal from Catholic Charities of Arlington to Mary Ann Hamilton, who was at that time in our office, for her review of it. Apart from that, her major thing was to tell me to call the Catholics organi[497]zations on the telephone and obtain assurances from them that if they were funded that they would not use the funds from our office to engage in teaching Catholic doctrine in either situation.

* * * * * *

[501] Q What, exactly, did Mr. Peterson ask you to do?

A He asked me to call the Catholic organizations that were high on the list and that were being given serious consideration as far as funding was concerned and he asked me to make sure that I didn't tell them they were being funded, that they were being seriously considered, and that to phrase the question in such a way that if you were

funded would you guarantee that you will not indulge in teaching Catholic doctrine with our funds.

Q Did he ask you to do anything else regarding that point?

A No. He seemed to be satisfied—this was the last couple days prior to the funding decisions and there really wasn't time to do any more than get in touch. I [502] explained to him, I think, what we were concerned about in the proposal and saying now, if you were funded, you are not proposing to do this, are you, with our funds. And he wanted a verbal assurance from me, reported back from me, on what I had found, as soon as possible.

Q Did you have any conversations with Ms. Hamilton concerning this topic?

A I did briefly on the Catholic Charities of Arlington.

Q Was this before or after you made these telephone calls?

A I believe it was before.

Q Who initiated that conversation?

A I cannot remember whether she initiated it or I initiated it.

Q What was her position at that time?

A As I understand it, she was in the offices as an expert consultant dealing with family planning related issues.

Q What was the content of your discussion with her?

A Well, I just remember her having the proposal in her hand as she was walking and encountered me someplace in the hallway, saying that she considered this proposal was proposing to use Catholic religion classes as a mechanism for [503] teaching Catholic doctrine with funds from our organization.

Q Did you ever mention your conversation with Ms. Hamilton to anyone else?

A No.

Q Did you do anything as a result of your conversation with Ms. Hamilton?

A No. I felt that she had reported back directly to Mr. Peterson and Mrs. Mecklenburgh. I didn't know that she had been given the proposal until then, until she told me herself, and I assumed that it was more or less a courtesy discussion with me, rather than expecting me to go back directly.

Q What was it that made you feel she was reporting to Mrs. Mecklenburg or Mr. Peterson?

A I felt that they had given her the assignment to read it and to give an opinion and I felt that was, you know, within their realm of responsibility.

Q Did she indicate that she had been given that assignment? You say you felt that.

A No. She indicated to me that she had been given the proposal for review by Mr. Peterson.

Exhibit 4

Outline for Prevention of Adolescent Pregnancy Program

PREVENTION PROGRAMS

1. Definition – Prevention of adolescent pregnancy through (a) prevention of premarital sexual relations and (b) family planning services including National Family Planning.
2. *Government involvement*: Why? Or is it the business of government to be involved in such programs?

   This administration has been emphasizing the importance of the family as the nucleus of society. Family life has been deteriorating in the United States. One of the consequences appear to be adolescent pregnancy which in turn has adverse effects on the family. The Title XX legislation is intended to stregthen the family by increasing the role of the family as it deals with adolescents. The hope is that through family involvement, premarital sexual relations will be postponed or through responsible and effective use of family planning, adolescent pregnancy and its adverse consequences on the family can be prevented.
3. *Will this program succeed?* Churches have been involved in this area for a long time. Their efforts have not been 100% successful and we do not anticipate our efforts will be either. However, we do hope that through joint efforts between public and private entities including churches and the Federal Government we will have a significantly beneficial impact on the problems associated with adolescent pregnancy.

* * * * *

11. *Moral/ethical or religious principles in prevention programs*

Programs receiving funds under Title XX may not use these funds to teach or promote religious or moral teachings (Separation of Church and State) that are a normal part of Sunday school, religious education or CCD classes.

Prevention courses, however, may be based on or related to these principles, but the teaching or promotion of the principles themselves with funds from Title XX is not permitted.

Exhibit 13

Excerpt from Grant Application of Catholic Charities of Arlington

FAMILY CENTERED SEX EDUCATION:

A PREVENTIVE PROGRAM

A Proposal
Submitted by:

The Catholic Charities of the Diocese of Arlington, Inc.
3838 North Cathedral Lane
Arlington, Virginia 22203

Aaron Palmer, Deputy Director
Telephone 841-2544

To: The Office of Adolescent Pregnancy Programs for the Adolescent Family Life Demonstration Program

April 29, 1982

TABLE A

III PROGRAM GOALS & EVALUATION MEASURES & OUTCOMES

GOALS/OBJECTIVES	MEASURE/CRITERIA	OUTCOMES
I. *Goals for the Adolescent*		
1. To develop responsible sexuality.	1.1 Changes on attitudinal measures. 1.2 Changes on knowledge and information. 1.3 Changes on self-administered questionnaire relating to self esteem, and sexual behavior.	1.1 Reduction in proportion with adolescent pregnancies. 1.2 Reduction in proportion with broken relationships with families. 1.3 Reduction in proportion with premature sex relations and premature marriages. 1.4 Increase self esteem. 1.5 Reduced proportion of teens drop-out of school.
2. To develop knowledge about sexuality and reproduction.	2. Changes in knowledge scores relative to sexuality.	2.1 Reduction in proportion with adolescent pregnancies. 2.2 Reduction in proportion with repeat pregnancies.
3. To clarify values of self, family, church, and community which relate to sexual behaviors	3. Improved knowledge and understanding of the long and short term implications of sexual behavior as measured by tests.	3. A reasoned value system relative to sexual behavior.
III. *Goals for Community and*		
1. To develop community support for a program of family centered sex education in private schools and religious education classes.	1.1 Increased volunteerism 1.2 Increased in-kind contributions 1.3 Increased support of United Way and agency.	1. Reduction in unintended adolescent pregnancies.

Exhibit 16

NOTICE OF GRANT AWARD (Continuation Sheet)

Date Issued: 9/30/82

Project Identification No.: APH 000101-01-0

Item No.:

1. The grantee shall comply with the regulations applicable to demonstration grants under Title XX of the PHS Act when such final regulations are published.

* * * * *

6. The grantee shall submit for OAPP prior review and approval informational and educational materials, such as curricula, media spots, films, publications proposed to be used by the project. When the project proposes to develop such materials, the grantee shall submit a concept paper for clearance before proceeding further. Where additional Departmental clearances are required, OAPP staff will forward the relevant materials to the appropriate officials.
7. The grantee shall submit a plan by 12/1/82 for involving the community, including religious and charitable organizations, voluntary associations, and other groups in the private and public sectors, in the selection and development of information and educational materials such as curricula, media spots, films, publications, etc., prior to their use in the project to assure that these materials will be appropriate to the community and in conformance with the purposes of Title XX of the PHS Act.

Exhibit 23

Excerpt from Grant Application

FAMILY OF THE AMERICAS FOUNDATION, INC. (FAF)

1983 ACTIVITIES

The current and ongoing activities of the office of FAF's Executive Director include:

- assisting national and international Ovulation Method centers to raise funds to carry out their work;
- preparing and updating instructional materials and teacher training curriculum for developed as well as developing countries and certifying new teachers;

* * * * *

- conducting conferences to educate government officials on the success of natural family planning in developed as well as developing countries;
- developing fertility awareness programs for adolescents with strong emphasis on the advantages of chastity and virginity;
- providing continuous communication on all our national and international activities with the newly founded "Pontifical Council for the Family" at the Vatican;

* * * * *

- participating in national/international conferences of medical, religious, government and education personnel.

* * * * *

Exhibit 24

Excerpt from Family of Americas Foundation Grant Application

In addition to teaching a woman to recognize her fertile mucus, the Billings Ovulation Method points out the side effects of artificial methods of contraception and stresses the benefits of periodic abstinence in the marriage relationship. It is not only a method of birth regulation, but also a philosophy of pro-creation and an orientation to sexual freedom and responsibility. It is this aspect of the method that renders it potentially useful for promoting self-discipline and chastity among adolescents. When young girls learn to respect and appreciate their sexuality by understanding how their bodies function, they become confident of the importance of their own self-determination in the process of pro-creation.

Exhibit 28

GRANTEE: Catholic Charities of the Diocese of Arlington Report of Site Visit made 3/25/82

* * * * *

Page 1—Program to Date

2) The facilities in Fairfax are adequate—church facilities are usually adequate for educational program.

* * * * *

Page 2—Summary of Program

This is a sex education program for parents and adolescents. The main purpose is to teach parents to be sex educators of their children. One program has been completed to date. The program was held at Good Shepherd Parish, Mt. Vernon, Va. The course began on January 18th and consisted of 6 sessions for parents and adolescents in the 9th through the 12th grade. The Course was attended by 66 adolescents and 180 parents. Prior to conducting this program, an advisory committee of parents and adolescents met there twice to plan the program. Some sessions were 1½ hours long—others 2. Some sessions were held jointly for parents and adolescents—others separate. Eight such groups were formed and reports were made from each group to the entire audience. Prior to holding the sessions, the parish sent out invitations to all parishoners inviting them to participate in both the planning of the program and in the program itself. On 3-24-83, the advisory group met to evaluate the program and made suggestions to improve the program—to include a different psychologist and more emphasis on friendship and dating relationships as topics. The agency plans a second session at St. Martin's in Vienna, Va. to be followed by sessions at Blessed Sacrement in Alexandria, St. Charles in Arlington, St. Anthony's in Falls Church and

an Episcopal Church in Winchester _____. Confraternity of Churches Doctrine teachers also attended the first program. These programs are enducted separately for religious educators or parochial schools. Religion is not part of the program. The program emphasizes primarily prevention and also teaches all methods of contraception. No problems have been encountered so far.

* * * * *

Page 8

How are clients recruited?

1) Calls to Pastors of local churches.
2) Contact with parents by staff.
3) Articles in local papers.
4) Newsletters to Parishoners.
5) the award of the Grant—articles in newsletters
6) Church Bulletins.

Letters to parents. Registration by parents.

Page 9

Client entry point?

Meetings—program scheduled at churches. Clients enter through sponsoring organizations. They complete survey forms, registration form, pretests, attend sessions, complete evaluation forms and post-tests.

* * * * *

Page 12

Family involvement?

Course is designed to involve family.

Parent Sessions include information on adolescent development and adolescent sexuality. Consciousness raising, values clarification, communication skills, role playing. This is accomplished by lectures, films, small group activities and discussions, (15-20 persons) and information handouts and bibliography.

Teen Sessions include information about reproductive anatomy and physiology, consequences of sexual activity, answers to teens' questions about sexuality. Exploration of values of individual, family, community, church. Decision making, relationship skills, communication skills.

Parents and Teens Together—Families attend course together. Presentation (by pastor) on Community and Religious values relating to sexuality. This answer questions raised by parents and teens and involves them is a dialogue.

Exhibit 29

Curriculum for Good Sheperd Catholic Church

SESSION IV FEBRUARY 22, 1983 7:30-9:00

7:30—Father Creedon lectures on values of the Church and community.

8:10—Break into individual groups.

Discussion Questions—Parents

Parents discuss how Catholic values fit into their lives.

1) What are you telling your teens about premarital sex?
   morality?
   consequences?
   Does this fit with presentation given by Fr. Creedon?
   Do you think the Church gives you the help and support you need?
   How could the Church be more helpful?
2) Are you comfortable explaining your values to your children?

Discussion Questions—Teens

Teens discuss how Catholic values influence their final decisions RE: Sex

1) What are your parents' ideas about premarital sex?
2) Are they telling you? Do you just know how they feel?
3) What part does religion play in you making decisions about sexual matters?
4) Do you get enough guidance from your Church about sexual behavior?

8:30-- Values Voting—Parents
Who's Responsible—Teens

SESSION 6 – PARENTS – MARCH 6, 1983 –
7:00-9:00 PM

7:00-7:45 PM – Dinner
7:45-7:55 PM – Wrap Up – Betty West – Father Creedon
8:00-8:30 PM – Evaluation Form
8:30-8:45 PM – Small Group Discussion and Evaluation
8:45-9:00 PM – Closing Slide Show

COMMUNITY FAMILY LIFE PROGRAM
100 HARRISON P.O. BOX 805
KENNETT, MISSOURI 63857
(314) 888-5892

October 19, 1983

Patrick Sheeran, Director
Program Development and Monitoring
Office of Adolescent Pregnancy Programs
Reporters' Building
300 7th Street, S.W.
Washington, D.C. 20201

Dear Patrick,

I am enclosing, for your review, an outline of the presentation which I delivered at the recent Harvard conference. Also included is a synopsis of our activities in the educational and nursing components during the last year. If you would like additional information or clarification, please don't hesitate to contact me.

Although we only initiated our workshop program in late August, to date we are having tremendous success in selling these educational services to the conservative, fundamentalist community that has, in the past, been the most vigorous opposition to sexuality education programs. We are now negotiating to provide this preventive service to parents of Headstart children at eighteen different sites in our service area. The most encouraging thing about our success with the fundamentalists and Headstart program is the probability that in working with these groups we will have the greatest opportunity to affect attitudes and actions in a population that, until this time, had not had access to these kinds of educational services.

Our researchers with the University of Missouri; Kansas City and St. Louis campuses, are very interested in Mrs. Mecklenburg's plan to bring the researchers in for a national meeting. Our researchers in St. Louis, Dr. Richard Thurman and Dr. Glenn White, feel that our success in delivering sexuality education through fundamentalist churches, if continued, could result in our becoming a model program for this type of delivery mechanism. Dr. Thurman and I have submitted an abstract for a presentation to be delivered at the June meeting of the American Association of Sex Educators, Counselors and Therapists (AASECT). We feel that a sufficient number of workshops will have been completed at that time to publish some preliminary findings on the project's activity.

* * * * *

Deposition Excerpts of
Barbara Rosengard,
Program Development Specialist,
Office of Adolescent Pregnancy Program

[Direct Examination by Ms. Hunter:]

[77] Q During your review of the grant applications, in 1982, did there ever come a time when you had concerns about the religious nature, or involvement of any of the applicants?

A Not for any that I reviewed.

Q Not for any that you reviewed, at what point?

A In the internal review process.

Q Did you have any concern for any applicant, whether you reviewed them or not? Did that concern arise for you, at any point?

A In a general way, as opposed to any specific knowledge.

Q Well, what was your general concern, can you describe that for me?

A I just wondered what some of the projects would be doing with the funds.

Q Would you identify for me which project you had that concern about?

A Just in general, some of the grants, it was a curiosity, rather than having read them.

Q Did you communicate your concern to anyone?

A I mentioned it to Patrick Sheeran.

Q Do you recall what exactly you said to Mr. Sheeran?

MR. MILLET: I object to that as calling for Agency [78] deliberations, and instruct the witness not to answer the question.

BY MS. HUNTER:

Q At the time that you had that discussion with Mr. Sheeran, was he your supervisor?

A Yes.

Q Did you include that concern in any documents that you wrote?

A No.

Q Did you ever receive, from any of your supervisors, any kind of guidance, or policy directives, on the question of the religious nature, or involvement of any applicant?

A No.

Q Do you recall how many projects were the subject of your conversation with Mr. Sheeran?

A Possibly two or three, that is all.

Q Do you recall now which ones they were?

A Just in terms of category of project.

Q What category was it?

A Prevention.

Q And do you recall the identity of those projects?

A Probably some of the Catholic charities projects.

Q Do you know which ones?

[79] A Not specifically.

Q There was more than one Catholic charities project, is that correct?

A Yes.

* * * * *

[88] Q Can you identify which programs were in that category, that is, unsuccessful applicants in 1982, who received an award under the National Grant Program in 1983?

A I can think of two.

Q Which two.

A Search Institute and Family of the Americas, which had another name earlier.

Q Okay.

At the time of the 1983 National Grants funding decision, did anyone on the staff of your office investigate the religious involvement, or possible religious involvement of the Family of the Americas Foundation?

A Not that I am aware of.

Q Did anyone make that kind of investigation at the time that the Family of the Americas Foundation applied in 1982?

A I don't know.

Q With regard to the Search Institute, do you know whether anyone on the staff of your office investigated possible religious involvement of that applicant, in either 1982 or 1983?

A No.

[89] Q Now, after projects were funded, it was also part of your job duties, for at least some grantees to have some oversight capacity, is that right?

A Yes.

Q Or some monitoring capacity. Did there ever come a time when you had questions about whether a grantee, an already funded grantee, under the Title XX program, was engaging in religious activities?

A Yes.

Q Can you tell me when that occurred?

A In the last month or so.

Q What project was that?

A St. Margaret's Hospital.

Q And what was the nature of your concern?

A I learned that there was a religious based curriculum that included teachings of the church, and we had never known of its existence, we had never seen a copy of it in the office.

Q Had any curricula materials been submitted to you by St. Margaret's?

A Curriculum was submitted, prevention curriculum, at the end of January, mid-January.

Q And what did you do in response to your concern?

A Well, I learned about it from someone else, someone [90] told me that there was a religious curriculum, and I was asked to call St. Margaret's to find out when it

had been developed, under what funds, and under what circumstances it was used, whether it was currently used.

Q And who told you of this?

A Well, initially the Director had asked me to get copies of all the St. Margaret's curriculum materials, because she was concerned about something that she thought was religious content, and I had not known, I had not seen anything of the sort. I was talking to Susan Rudy, in our office, who said that this did exist, and that I—and that she asked me to call and clarify under what funds it had been developed, and how it was used.

* * * * *

[104] Q With regard to the St. Ann's program, can you state for the record who the grantee is in that program?

A St. Ann's Infant and Maternity Home in Hyattsville, Maryland.

Q Is that a Catholic organization?

A Yes.

Q Did you do a site visit for St. Ann's?

A Yes, I did.

Q When was that?

A In March of 1983.

Q Are you the only Project Officer that sets up, so that these people make these visits, or do you make the visits alone? How are the visits set up?

A It varies. I went to St. Ann's with two other people. It was easier, because it was local, and travel was restricted, of course, in terms of funds.

Q Were the two other people also, did they also have [105] oversight responsibility for the St. Ann's program?

A One of them did, as the Grants Management Project Officer. We have Grants Management Project Officers assigned to each and the Grants Manager went. The other person was a consultant to the office, working on evaluation.

Q Who were those two people?

A Shirley Tardif was the person from the Grants Management Office. Bruce Spitz was the consultant.

Q When you made the site evaluation to St. Ann's, what did you see, or what did you do?

A We met first, I think met the fiscal people. We saw the whole facility, and had a walkthrough of their facility, especially the parts that they had renovated for the after care, which is one of the main components, and then went through the school, talked to teachers, and then basically talked to other staff.

Q Is the after care component—that includes the Natural Family Planning?

A The after care is the residential care program for the—for about eight mothers who have no means of living alone.

Q With regard to the Natural Family Planning classes, are there such classes that are part of St. Ann's program?

[106] A Yes.

Q Did you visit any of those classes?

A No.

Q Has your office, or you, received any copies of the educational materials that are used in the St. Ann's program?

A I don't believe I have received materials from them, but that—the materials are mainly, have been requested in terms of the curriculum. It is mainly in terms of the prevention program, and that is a CARE program.

Q When you say that is a CARE program?

A St. Ann's is a CARE program.

Q Have you received any of the materials that are associated with the Natural Family Planning classes, or that component of the St. Ann's program?

A I don't recall. I don't remember.

Q What is your understanding of what the Natural Family Planning component of that program includes at St. Ann's?

A I believe it is the teaching of fertility awareness, of the Natural Family Planning method.

Q And are there materials distributed in those classes?

[107] A I believe. I am really not sure.

Q Have you ever requested to see any of the materials that might be given out as part of the Natural Family Planning courses?

A I don't know if I requested, as such. I remember commenting I was sorry that people from Providence Hospital had not been part of the site visit, that they had not been included.

Q Is it part of the program, so far as you understand it, at St. Ann's, to monitor for at least six months, the charting progress of each client who chooses to continue the charting, in the Natural Family Planning classes?

A I don't know the details of that.

Q And it was your testimony that you never sat in on one of the classes, is that right?

A Yes, that is right?

Q To your knowledge, does St. Ann's program have a number of subgrants, or subgrantees?

A It has.

Q Or subcontractors?

A It has a couple.

Q Are all of those with Catholic organizations?

A I don't think they all are.

[108] Q Do you know who they are with?

A I know they deal with Catholic University and Providence Hospital, and Catholic charities, but they also deal with other groups in Anacostia, that is part of the program, they have expanded now in their Outreach component, and we talked about working with Cities-in-Schools.

Q Other than?

A Community organizations.

Q Other than cities and schools, do you know any other organizations that they are affiliating with?

A They are affiliating with a Hot Line, I believe, in Maryland, and they are starting to work with other community organizations. That is part of the program they are really starting.

Q You mean other than Catholic organizations?

A Yes.

Q For the record, St. Ann's is located in Hyattsville, Maryland, is that right?

A Yes.

Q Has there been – how many site visits has there been to St. Ann's, so far as you know?

A One.

Q Have you ever visited the Providence Center for

[109] Life?

A No.

Q Is that a part of the St. Ann's program?

A Yes.

Q And what is their function in the St. Ann's program?

A Family life education, and natural family planning, Providence Hospital.

Q Have any of the materials used in the family life education component at the Center for Life been submitted to you, or anyone else in your office?

A I don't recall seeing it.

Q Have you ever requested any of them?

A No.

Q Do you know whether anyone else has requested any of them?

A I don't know that anyone has. I don't know.

Q And I believe you alluded earlier to an after care program, and then described it as being the academic

program, or the program for young women, is that correct?

A Residential program.

Q Residential program?

A Yes, for mothers and their babies, mothers who are [110] at high risk of child abuse, or other problems, because they have no other family resources.

Q Is there an academic program?

A Yes, there is, an accredited school on the site.

Q What school is that, do you know?

A It is teachers from Maryland, from the State.

Q But the school is located on site?

A Yes. Yes.

Q And can you tell me exactly where it is located?

A It is in the St. Ann's facility, I forget what floor it is on, but it is in the St. Ann's facility.

Q And have you, or anyone else in your office, ever reviewed the materials that are used in that academic component?

A No.

Q Have you ever requested those materials?

A No.

Q To your knowledge, has anybody else in your office ever requested those materials?

A No.

Q St. Ann's was funded, I believe, in the first year of the funding cycle, is that correct?

A Yes.

[111] Q And was it refunded?

A Yes, it was.

Q Did there come a time when additional funds were provided for St. Ann's, beyond what they had originally been granted?

A Yes.

Q When did that occur?

A At the time of refunding.

Q Was that additional funds for the coming year, or for the previous year?

A The coming year, present. Funds are granted on the last day of the preceding fiscal year, from September 30th, 1983, it is fiscal 1983, but the program operates for the next year.

Q And St. Ann's received funds in excess of what they requested, is that right?

A Yes.

Q Why did they receive more money than they had requested?

A I don't know.

Q Who made that funding decision?

A The Director.

Q Was there any other program, to your knowledge, that [112] received more money than they requested?

A Yes.

Q What were they?

A A few of mine did. Tacoma-Pierce, Health Department in Tacoma, Washington did; St. Margaret's Hospital did, Lexington-Fayette Health Department, in Lexington, Kentucky did; Brigham Young University, of the projects I monitored, those are the ones that I can recall.

Q Do you know the reasons why any of them received more money than they requested?

A My understanding is there was extra money, there was money left over at the end of the year, and the Director just decided to allocate it. Some of it was in response to requests.

St. Margaret's requested extra money, because their negotiated indirect cost rate had increased, and they got the extra money.

I had requested a supplement for another project, and that was awarded.

Deposition Excerpts of
Elizabeth N. West,
Coordinator, Children's Services at
Catholic Charities Diocese of Arlington;
Project Director of CCDA's Parent/Teen Sexuality Program

[Direct Examination by Ms. Hunter:]

[15] Q Now, what is your connection, Ms. West, to the Teenage or Parent/Teen Sexuality Program that's being offered now by the Catholic Charities?

A I am the Project Director.

Q When did you become Project Director?

A As soon as the grant was given.

Q Did you assist in writing the grant or did you write the grant proposal?

A Yes, I wrote it with the assistance of an [16] administrative person.

Q How did you come to prepare that proposal?

A Well, we had for years been seeing thousands of adolescent, pregnant girls coming in and out of our doors and we had been helping them as best we could, but we came to believe that what we were doing was nice Band-Aids, but we really ought to be doing something in the prevention field as well. In fact, we had decided to do a preventative program just shortly before I got a copy of the Federal Register with the legislation in it which financed these grants.

Q How did you get a copy of the Federal Register? How did it come to your attention?

A Somebody sent it to me.

Q Who sent it to you?

A I think – I think it might have been Jerry Ernst, who at the time may have been employed by the National Conference of Catholic Charities. He had been at a meeting when I was talking about wishing to do a preventative project, so I think it was at that meeting.

Q What meeting was that?

A That was a day long conference that the whole staff had to rethink our programs and decide on new directions for the future.

[17] Q By "whole staff," you mean Catholic Charities of Arlington?

A Yes, as well as some of our board members were there and Jerry Ernst had spoken to us at that meeting.

Q Who did you discuss the preparation of the grant proposal with?

A I discussed it with the administration of the agency.

Q Who do you mean by that?

A Aaron Palmer, in particular, and Father Creedon, to a lesser extent.

Q What was the nature of your communications with them?

A Well, something about here was some money that might be available to us to do the preventative program that we had been wanting to do.

Q Who is Father Creedon?

A He is the Executive Director of Catholic Charities of the Diocese of Arlington. He is also the Pastor of Good Shepherd Church.

Q So, Mr. Palmer, is he an assistant to Father Creedon?

A Yes, he is. He's Deputy Director.

* * * * *

[24] Q Is the Sexuality Program of Catholic Charities now funded exclusively by the grant from the Office of Adolescent Pregnancy Programs?

A Well, it is a matching grant and we have to come up with 25 percent of the funds.

Q Catholic Charities themselves comes up with 25 percent of the funds?

A Our sponsoring groups come up with in kind contribution, plus money and plus there is the contribution of Catholic Charities and that makes up 25 percent.

Q Did the decision whether to apply to the federal government for this grant get submitted to the Board of Catholic Charities of Arlington for approval?

A Yes, it did.

Q I take it it was approved?

A That's right.

[25] Q Were there minutes kept of that meeting?

A I'm sure.

Q Do you know approximately when that meeting occurred?

A No, I really don't. It would have been in the spring sometime, April, May, June.

Q The spring of what year?

A Of the year I submitted the grant proposal, which was 1982.

Q Were you present at the board meeting for that discussion?

A Yes, I was.

Q Did you present the proposal yourself?

A I did.

Q Can you tell me everything you remember about the discussion about the proposal among the board members?

A There wasn't very much discussion about it, actually. I presented the program and the reasons we wanted to do it. The board said, "We couldn't afford it." I said, "Don't worry; no grant, no program," and it passed.

Q Were there any modifications or specifications adopted by the board for the contents of the proposal or for the program?

[26] A None.

Q Do you remember if there were any negative votes?

A I don't recall a single one.

Q Was Father Creedon present at the meeting?

A Yes, he was.

Q Was Bishop Keating the bishop at that time?

A No. Thomas Walsh was bishop at that time.

Q Was Bishop Walsh—

A (Interposing) I'm sorry. It was Welsh, I think.

Q Was Bishop Welsh present at that meeting?

A No, he was not.

Q Did you have any discussion at or about that time that the grant was being prepared, the original proposal was being prepared and submitted, with either Bishop Welsh or anyone on his staff?

A Yes, I did.

Q With whom did you speak?

A I spoke with Bishop Welsh. I also spoke with Brother John Bardo, Father Davis and Father Franklin MacAfee.

Q Can you tell me what your conversations were with Bishop Welsh?

A Yes. I told Bishop Welsh that we had applied for this grant to do Sexuality Education. I told him why it was [27] we wanted to do it. I also told him that as this grant was federally funded that there could be no religion taught in this program, because he had to understand that going in.

Q What did he say?

A He accepted what I said and understood and approved the fact that we had submitted the grant proposal.

Q Was this conversation with Bishop Welsh before or after the board meeting with Catholic Charities?

A I don't recall.

Q Was it an in-person meeting?

A It was an in-person meeting.

Q Did you have any subsequent conversations with Bishop Welsh?

A I don't recall any.

Q So, that's the only time that you talked to Bishop Welsh about the program?

A Uh-huh.

Q You mentioned Father Bardo?

A No, Brother John Bardo.

Q How do you spell his last name?

A B-a-r-d-o.

Q What were your conversations with him?

A The same as my conversation with Bishop Welsh.

[28] Q What is his position?

A His position is he is head of the Religious Education Department for the Diocese.

Q Was he present at the conversation with Bishop Welsh?

A No, he was not.

Q This was separate?

A That was separate.

Q How many times have you spoken with Brother Bardo?

A I spoke with him just that one time. I may have had a short telephone conversation with him on the same subject a little bit after I spoke with him in person.

Q What would that conversation have been about?

A Oh, I can't recall. I was asking him if he had any suggestions for us.

Q In terms of what?

A In terms of anything.

Q When you say "us," who do you mean?

A Catholic Charities, the staff who were to do the program.

Q Did he have any suggestions?

A Yes, he did. He sent us over a bibliography and that's all, just a bibliography.

[29] Q A bibliography of what, do you know?

A Of books we couldn't use in the program. They were religious books.

Q I believe you also mentioned a Father–Brother Davis?

A Father Davis.

Q What is his position?

A He is the head of the Catholic School System for the Diocese of Arlington.

Q Can you tell me the contents of the conversations or meetings you had with him about this program?

A Yes. Again, I explained to him what it was that we were doing and I also explained that as it was a federal program there could be no religion in it, and I asked him if he thought that this program would be acceptable to the Catholic Schools.

Q What did he say?

A He said, "Yes, somebody better do something. We can't wait for the perfect program. Do it now."

Q When you say "Catholic Schools," to clarify, you mean parochial schools; is that correct?

A Parochial schools, yes.

Q At that time it was under discussion or [30] consideration, at least, that this Sexuality Program would be done in parochial schools or presented in parochial schools?

A That it might be.

Q I take it that it has not been–at least not yet; is that correct?

A That's correct.

Q Can you tell me why it hasn't been?

A Well, as our plans evolved and over that summer before I got the grant, I made it my business to get informed about the best way to do sexuality education. I came to believe that parents should definitely be included and that meant night sessions. That meant a whole different format from going into schools, and we decided that we would advertise it for community groups.

Q I see. At the time that you had originally planned on doing it in the schools, you considered, I take it, doing it during the day; is that right?

A Yeah, we thought about it. That plan wasn't very refined. What I was trying to demonstrate in that proposal was that I felt we had access to a large enough numbers of people to actually do this program.

* * * * *

[69] Q Okay. Is there an Advisory Group that's been convened at St. Elizabeth's Seton?

A There was a partial Advisory Group convened, but they were going to enlarge it and we haven't met with any enlarged group yet.

Q Do you know whether it is planned that there will be a presentation on religious beliefs?

A I don't know.

Now, when we say "presentation on religious beliefs," it is a matter of a religious consultant answering the questions having to do with religion that come up during the course.

Q What are you describing when you make that statement?

A During one of the sessions of the course, usually the first or second, we distribute file cards and ask all the participants to write down any questions they might have regarding sexuality, since we promise going in to get answers for all of them. All of those which have to do with religion are referred to the Advisory Group to do with what they will, which is usually to get a religious consultant of their choice. The others are answered by our staff during the [70] course of the program.

Q Who actually writes the answers to those questions, the ones that are answered by your staff?

A I've done a lot of them and Pat Mudd has helped me with them.

Q I take it there are some questions that come up that do pertain to religious beliefs that are deferred or passed along to the Advisory Committee; is that correct?

A That's right, anything that has to do with religious beliefs are passed on.

Q Are you the person who selects which of the questions gets passed on to the Advisory Committee?

A I or Pat Mudd or both of us working together.

Q Okay. Ms. West, I'm going to show you what's been marked as Cullen Deposition Exhibit 5. Do you recognize that?

(Handing to the witness.)

A Yes.

Q What is that?

A That's the questions that the Good Shepherd Group wrote when we did our first program with them.

Q Okay, and did you compile or prepare the answers to the questions?

A Yes.

[71] Q Then did you pass that sheet back out to the participants at Good Shepherd?

A Yes.

Q Do you recall at what point in the program the sheet was passed back out to the participants of Good Shepherd?

A No, I don't. I don't recall.

Q Okay, but it was sometime during the course of the program; is that right?

A Yes.

Q Yes?

A Yes.

Q The questions were actually collected on the first session; is that right?

A Yes, although we have question boxes available at every session of the course so that people can continue to put in questions during the course.

Q Then at some point you compiled the answers or write the answers?

A Right.

Q I note that some of the questions are answered with substantive answers; is that right?

A That's right.

Q Some of them are answered with a phrase "previously [72] answered;" is that right?

A Right.

Q What does the phrase "previously answered" mean?

A That means that they were answered previous to our writing the answers to the questions.

Q Answered previously during the course of the Sexuality Program?

A Yes, during the time encompassed by that program.

Q Directing your attention to the first page of that, Question No. 9,—

A (Interposing) Yes?

Q (Continuing)—that question reads, "How does abortion kill an unborn child," and then there is an answer with a listing of one, two, three, four, five describing various procedures for abortion. Did you write the answer to that question?

A Yes, I did.

Q Now, let me show you what's been marked as Cullen Deposition Exhibit No. 6. Do you recognize that?

(Handing to the witness.)

A Yes. I am told that these are the questions from the St. Anthony's Parish course. Now, again, I was out of the country when this course was done, so I wasn't there.

[73] Q I see. Did you write the answers to these questions?

A No, I did not.

Q Do you know who did?

A No, I don't specifically know.

Q Based upon your position as Project Director, who would you have expected—

A (Interposing) It would have been Pat Mudd, perhaps, with the assistance of Linda Cullen.

MR. HIRT: Which number is that?

MS. HUNTER: Cullen Deposition Exhibit No. 6.

BY MS. HUNTER:

Q Ms. West, were you present at the sessions of the course or program at the Good Shepherd Church?

A Yes, I was.

Q Did you attend every session of that?

A Yes, I did—Oh, no, I didn't. I beg your pardon. I was not there for the last session.

Q All right. Thank you. As a means of clarification, I'm talking about the first program at Good Shepherd.

A Yes.

Q Your testimony is that you were not there for the last session, but you were there for all the previous [74] sessions; is that right, the first five?

A Yes.

Q Showing you, again, what's been marked as Cullen Deposition Exhibit No. 5, and directing your attention to Page 2 of that exhibit, Question 11, 11 reads "What is the church's view on overpopulation," and the response is 'previously answered." Do you remember what answer was given in response to that question at Good Shepherd?

A Not exactly. An answer about the church being concerned with overpopulation and with the needs of people.

Q May I see that again?

(Handing to counsel.)

Directing your attention to that same exhibit, Question No. 16, the question reads "Is the church against all abortions," and the answer is "previously answered." Do you recall what answer was given to that question in the program at Good Shepherd?

MR. ARBOUR: Are you referring now to the Catholic Charities' Program?

MS. HUNTER: Yes, in the program of which Ms. West is the Project Director.

A Well, now let's say that those—that that question and the one on overpopulation were taken by Father Creedon in [75] the hour that he had in one of the sessions in order to answer those specifically religious questions that had come up, and you are asking me what did he say about all abortions?

BY MS. HUNTER:

Q Is that your answer, that the question was answered by Father Creedon?

A That's correct.

Q Directing your attention to this same exhibit, Question 31, which reads "What's the best method of birth control," and the answer is "previously answered." Do you recall what answer was given to that question at the Good Shepherd Program?

A I think I could find it on another page. I refer you to Question 21 on Page 3.

Q All right. The question you are referring me to says, "What type of contraception is the most effective," and the first word of the answer is "abstinence"?

A Yes.

* * * * *

[128] Q What is your understanding, Ms. West, as between the Parish Advisory Committees and the Project Staff of the Sexuality Program as to who decides the contents of the curriculum of the program?

[129] MR. ARBOUR: Excuse me. The curriculum of the Catholic Charities Program you are talking about?

MS. HUNTER: Correct.

A Well, the Advisory Group decides whether they can, in fact, use what we have to offer.

BY MS. HUNTER:

Q Who makes the final decision about the contents of the curriculum?

A The Project Staff and the Agency.

Q So, if the Parish Advisory Group says, 'We don't like this and we don't want it in,' it can still go in? Is that your understanding?

A Maybe it could, but we wouldn't put it in if they objected to it.

Q It seems to me what you are saying is the decision rests with them. In other words, if they object, then it doesn't go in; is that correct?

A If they object to a certain segment, we would not put it in.

Q All right.

A And I think that's a sound principle of sex education. At least, I'm so advised by sex educators that you don't go in and try to teach things that are unacceptable to [130] the group that you are dealing with.

Q Now, do you yourself meet with the Parish Advisory Committees?

A Yes, I do.

Q Have you met with all of them?

A Yes, I have.

Q Can you give me some sense of how many times you would typically meet with those groups and what the process would be?

A We would meet with those groups at least three times, but we might meet five or six times depending on the group.

Q Is that five or six times prior to the time that the program was done?

A That's right.

Q Can you describe to me, generally, the contents of those meetings?

A Yes. As I've said, we would have the first meeting with a small core group chosen by whoever calls us. We describe what we have to offer and we tell them what we would expect of them. Then we arrange to come back a second time with films and literature and describe the activities in more detail. We also question them about what they think should be [131] included in such a course.

Q All right, and are there subsequent meetings after those meetings?

A Yes. Then they may wish—probably will wish to meet with us subsequently, as they have added new members who need to be brought up to date on this.

Q When they make suggestions about what should be included in the course, is it typical that you would incorporate those suggestions into the courses actually presented at that parish?

A Yes.

* * * * *

[164] Q Ms. West, I'm going to read to you some passages from one of the books that was listed in your original grant proposal, which has come up in earlier testimony, called *Education in Human Sexuality for Christians.* I only have one copy of this book. I'm not going to read that much from it, but I'm going to read a certain passage and then I'll let you look at the certain passage, if you want to refer to it, rather than making the whole thing an exhibit in this deposition.

MR. ARBOUR: Counsel, could you identify the specific publication?

MS. HUNTER: I think I just did. *Education in Human Sexuality for Christians,* it is copyrighted 1981, published by United States Catholic Conference.

BY MS. HUNTER:

Q I'm going to read first from page 63, which is the beginning of Chapter 4, which is titled "Sex Education in the

Context of Formal Instruction in School." What I'm going to do, Ms. West, is read you a passage and ask you to listen carefully to that passage and then ask you a couple of questions. As I said, you'll be able to look at the passage [165] when I ask you the questions.

"The purpose of formal instruction in sexuality is threefold. One is to enable each student to increase her or his understanding and communication of self and others as sexual persons, that is to promote the development of a sexual identity, to enable each student to develop and clarify and integrate the values regarding her or his relations with others, which are conditioned by maleness or femaleness, to enable the learner to act responsibly as a Christian regarding his or her sexuality. Some real estate experts emphasize that there are three rules of the real estate business, location, location and location. Likewise, we can say that there are three rules for which we must scrupulously observe in the planning process: Begin with the parents, include the parents throughout the planning and execution of the program and have parents conclude or evaluate the program. There are many reasons for including parents throughout the entire planning process. The most fundamental reason is based on the realization that values which children form regarding their sexuality are derived primarily from the family context. The old proverb, 'The apple does not fall far from the tree' is very much to the point regarding the formation of values. In many instances parent enrichment should actually be the first [166] goal of any sex education program which is being developed for children. Without parent enrichment and parent parental value clarification, the program will be crimped from the beginning."

That's the excerpt and I would like you to tell me, Ms. West, whether the principles and tenets of the Sexuality Program that you are the Director of are consistent with the principles and tenets reflected in that lengthy excerpt that I just read?

A I would say so, with the exception of the phrase "As a Christian" in No. 3 under A.

Q That they are consistent?

A Well, if you will read that "To enable the learner to act responsibly regarding his or her sexuality," then that would reflect the views of our program.

Q Would the remainder of the excerpt also reflect the views of your program?

A The remainder of the page, with the exception of this phrase which we have deleted, yes, –

MR. ARBOUR: (Interposing) The next paragraph, which is what was read, right?

THE WITNESS: Yes. Yes, that's not – that's not all the views of our program, but those views fit into our program.

[167] BY MS. HUNTER:

Q I'm going to do the same thing from Page 65 of the same document. "Knowledge in itself is not harmful, therefore, every major facet of knowledge and value in relation to sexuality should be covered at some point in developing a curriculum. Subsequently, the following goals and objectives include not only such aspects of sexuality as love, intercourse, family planning, responsibility, chastity, Christ, joy and appropriation, but also such subjects as homosexuality, abortion, divorce, rape, prostitution, venereal disease and pornography. To withhold knowledge or answer questions dishonestly can only lead to disinformation and a warped set of values. How can students evaluate without knowledge. How can they internalize values and employ Christian principles without knowledge? It is better for knowledge to be transmitted in a valid and/or scientific setting amenable to the examples and teachings of Christ, rather than be transmitted by a school friend, a magazine or a television program."

The heading for that particular section on that page is the word "content."

Ms. West, are the principles and tenets of the Sexuality Program that you are the Project Director of [168] consistent with the philosophy of the lengthy excerpt that I just read?

A If you will delete "Christ" and "Christian principles."

MR. ARBOUR: Counsel, are you asking when you say the philosophy of what's been read, are you sort of talking about the overall theme of what's in here as opposed to every possible word?

MS. HUNTER: Well, I'm asking about the meaning about what I just read as she understands the meaning of it.

THE WITNESS: Of course I understand the meaning of it.

MS. HUNTER: I was just clarifying for Mr. Arbour.

BY MS. HUNTER:

Q Could you answer the question?

A If you talk about the course, you know, the course includes our input as federal grantees, the input of the participants of all of their values, whatever they may be, and also there is that Advisory Group segment over there.

Q Perhaps, then, I should clarify and say what I'm referring to are the philosophy of the courses as your central project develops the philosophy of the course. Is that consistent with the –

[161] A (Interposing) To give knowledge to be evaluated.

Q Is your philosophy consistent with the philosophy that's reflected in the excerpt that I just read?

A The philosophy that sex education embraces knowledge, values, science and religious beliefs – it does for people who have religious beliefs. It doesn't for people who don't.

Q Do you understand my question, Ms. West?

A You are asking if my philosophy is the same as what is stated in this segment here (indicating).

Q I'm asking you if your program's philosophy is, yes.

MR. ARBOUR: I think she's trying to answer it.

MR. HIRT: Counsel, I think that we could even have Planned Parenthood intervene in this case and agree to all the statements, except for the Christian references.

MS. HUNTER: Well, Mr. Hirt, if you want to make a speech and take up time—

MR. HIRT: (Interposing) I'm objecting to the argument you are having with the witness about her agreeing to a particular phrase. I think it is a questionable use of deposition time. She's trying to answer the question and you are trying to squeeze blood out of stone at this time.

MS. HUNTER: That is not an appropriate objection.

MR. HIRT: I think it is very appropriate. Perhaps [170] your clients would like to stipulate to all these statements. I'm sure your clients are against prostitution and pornography, and I don't know where we are going by you asking Ms. West except for "Christian" if she agrees.

MS. HUNTER: Mr. Hirt, I don't know what your objection is, but I think it is fully on the record.

MR. HIRT: At least you understand that I've said it. I don't think you understand it.

MS. HUNTER: I don't think there is a question about whether I understand it. It is the question of what proper objections are.

The witness can answer the question.

MR. HIRT: She answered it once, but answer it again.

MS. HUNTER: Who are you representing in this deposition?

MR. HIRT: I'm representing a party to the case. I have a right to object to questions.

MS. HUNTER: I believe Mr. Arbour is representing the witness.

MR. HIRT: He is, that's correct.

MR. ARBOUR: Would you like to elaborate on the answer that you have already given?

[171] THE WITNESS: I agree that it is important that every major facet of knowledge and values in relation to sexuality should be covered in the curriculum.

BY MS. HUNTER:

Q Ms. West, can I ask is there any way in which the principles of your Sexuality Program conflict with the excerpt that I just read?

A Yes, in that what we offer is not "Christ, joy, Christian principles." The example and teachings of Christ, they are no part of our curriculum.

Q All right, and is there any other way that they conflict?

A As I said before, religious belief as a content, as part of the contents of sex education would depend on whether the participants had religious beliefs.

* * * * *

[Cross-Examination by Mr. Hirt:]

[201] Q I'll ask you this and then ask you to state whether it is accurate and then you can clarify it. Seventy states, "According to a site report, C.C.A."—which is Catholic Charities of Arlington—"has used the following means to advertise or attempt to reach individuals: Announcements from the pulpits, letters to all parishioners at Good Shepherd Parish, articles in church bulletins, articles in local newspapers, articles in local newsletters, articles by the Bishop of the Diocese on the grant, local church letters," and then there is a reference to a page of the report. Is that statement accurate and if not, could you elaborate to where it is inaccurate?

A It may be accurate in that that's part of a site report, but articles in local newspapers rather than newsletters would be accurate.

Q Is there anything else in there that looked–

A (Interposing) In 72, do you want me to read that?

Q Well, let me–I'll read it.

Seventy-two says, "Programs have been held at Good Shepherd Church; St. Martin's Church, Blessed Sacrament, Alexandria, Virginia; St. Anthony's Church, Falls Church, [202] Virginia; Episcopal Church, Winchester, Virginia." Can you make a statement as to whether those are accurate?

A That is not accurate. St. Martin's Church should be deleted. I don't know if any such church exists. Blessed Sacrament Church, Alexandria, Virginia should be deleted. We have not done a program there. Episcopal Church, Winchester, Virginia, we have not done a program there. St. Mark's Church, Vienna, Virginia should be added and, if you want to include the present program which we are finishing next week, it would be St. Charles Church in Arlington.

Q Those are the programs you have already described in prior testimony; is that correct, without going through and naming them again?

A Yes. Yes.

Q Let me just ask you one more question on this. I'll again quote a statement and–

MS. HUNTER: (Interposing) Now, what document is this?

MR. HIRT: The same document.

MS. HUNTER: The same document?

MR. HIRT: Yes.

BY MR. HIRT:

Q Sixty-one states in part, according to its Catholic [203] Charities of Arlington Articles of Incorporation, "The purpose for which the corporation is organized is to conduct, coordinate, develop and promulgate programs and activities concerned with the personal, economic and

social welfare needs of families, children and individuals in the Catholic Diocese of Arlington, Virginia, not inconsistent with the Code of Canon Law of the Roman Catholic Church and the Statutes of Virginia." That's the statement in that paragraph?

A Yes.

* * * * *

[Re-Direct by Ms. Hunter:]

[215] Q Just as examples, let me direct your attention to what appears as Question No. 5, which says, "Everything about masturbation," and the answer is "Previously answered."

A Uh-huh.

Q When was that previously answered?

A That was answered by Doctor Azcarate in his presentation.

Q To the best of your recollection and understanding was there any religious contents to that answer?

A There was not.

Q And–

A (Interposing) Except that he might have said that 'If your religion forbids it, you may feel guilty afterwards.'

Q All right. What about Question No. 2, which reads, "Want to know about premarital sex," and the answer there is "Previously answered"? When was that previously answered to the best of your recollection?

A Well, as I told you, we had this film after we did an activities with the teens where they brainstormed the pros and cons of having sex, and also that was one of the questions–I'm trying to think whether Doctor Azcarate went into that or not. I don't remember.

Q All right. To the best of your recollection, was [216] there any religious contents to the answer which had been given to that question as it had been previously answered?

A To the best of my recollection, no, although Father Creedon did handle some similar question in his presentation.

Q All right.

A But even that wasn't religious.

Q Okay. Question No. 6 on the same document says, "What's S and M," and the answer is "Previously answered." To the best of your recollection, was there any religious contents to the answer to that question as it had been previously answered?

A No, there was not. Previously answered refers to the answer to Question 1.

Q I see, on the same page?

A Right, and there is no religious contents to that.

Q For Question 11, as I understand your testimony, Question 11 is "What is the church's view on overpopulation," and the response there is "Previously answered." Is my understanding correct from your earlier testimony that that previous answer was given by Father Creedon?

A That's right.

Q And that there was religious content to that answer?

[217] MR. ARBOUR: Your question is whether there was religious content in Father Creedon's answer to that specific question?

MS. HUNTER: Correct.

MR. ARBOUR: If you remember.

A Well, inasmuch as he said the church is concerned with the needs of the people, if that's religious content.

BY MS. HUNTER:

Q What about Question 16, "Is the church against all abortions," and the response is "Previously answered." My understanding of your testimony is that that phrase "Previously answered" refers to Father Creedon's presentation; is that correct?

A That's correct.

Q Was there religious contents to Father Creedon's answer to that question?

A Yes, because the religion – It is a religious question asking specifically for the church's viewpoint.

Q Would it then be correct to say, Ms. West, that when the phrase "Previously answered" was used in these questions and answers in Cullen Exhibit No. 5 there was no distinction made on this document or in this document between answers which had contained religious contents and the answers which had not [218] contained religious contents?

A That's right, and no distinction between answers that were given on that piece of paper and the answers which came in various presentations and group discussions.

Q All right. In the testimony that was elicited by Mr. Hirt, I believe that he asked you about the language in one of the documents in terms of values that could have come up in the course of dealing with the Advisory Groups, and I recall that your testimony was that it always comes up whether to do a presentation on contraception and that so far each group has wanted to have such a presentation; is that correct?

A That's correct.

Q If such a group did not want to have a presentation, would it be correct if such a presentation would not be presented to that group?

A That is correct.

Q Okay, and I also understood that you testified that it was your understanding that the Advisory Group and that the participants might want to bring up the topic of religious values or their own religious beliefs; is that correct?

A Uh-huh.

Q Would it be correct to say that bringing up such religious beliefs would be likely to occur in the small group

[219] sessions, so that would be one place?

A That's right.

Q So, those would be the small group sessions facilitated by the staff facilitators; is that right?

A That's right.

Q What would be the role of the facilitators when a member of the small group brought up his or her religious beliefs with regard to sexuality?

A The role of the facilitator would be to continue to facilitate, which implies a nonjudgmental attitude, not imposing one's own values on the group, but getting group discussion going on that subject and asking others what they thought.

Q So, trying to develop the discussion on any topic, including religious topics that the participants might bring up; is that correct?

A That's correct.

* * * * *

[221] Q Did you attend the sessions that were held at St. Mark's?

A Yes, I did.

Q Did you attend the final session of that program?

A What do you mean by – Yes, I did.

Q Were the evaluations of the Catholic Charities Program distributed at some point during that final session?

A Yes.

Q And they were collected?

A And they were collected.

Q Following the collections of those evaluation forms, did Father Hortum make a religious presentation?

A Yes, he did.

* * * * *

[228] Q Directing your attention to Exhibit 13 and the page titled "Session IV, February 22, 1983," this is the

page that reflects Father Creedon's presentation on church and community values and then the breaking up into individual groups?

A Right.

Q Were those individual discussion groups facilitated by the facilitators?

A Yes, they were.

Q Was the purpose of those groups to discuss the discussion questions as they are reflected on this page?

MR. HIRT: Let me clear this up. Technically, you are outside of the previous examination, but go ahead. I'm not as much of a technician as you are.

[229] A Yes. They were suggested questions for the facilitators to help them to get out the reactions of their group members to the presentation, which had been given by Father Creedon.

BY MS. HUNTER:

Q These sessions that the facilitators did were for – and I'm reading now from the document – for each parent and teens in discussing how Catholic values fit into their lives or influence their final decisions; is that correct?

A Yes. As I say, these were suggested questions.

Q Do you consider that not to be the promotion of religious values?

A Exactly. I consider it not to be the promotion of religious values.

Q All right. Why?

A Because our facilitators are not promoting any religious values in these sessions. They are simply getting the reactions of the participants to a lecture they have just heard.

Q And part of the facilitator's job, as I have understood your previous testimony, is to encourage the development of discussion and keep the group focused on certain topics; is that correct?

[230] MR. ARBOUR: Counsel, I don't know that she's exactly said that, but she certainly has talked about what the value of the small groups is and she can answer if she would like to elaborate on that.

A It is to encourage discussion and participation of the people who are there.

BY MS. HUNTER:

Q So, it would be fair to say then that the role of the facilitators on February 22nd, 1983 was to encourage discussion of the topics as they are reflected in that document; is that correct?

A Well, as I said before, these are suggested questions for facilitators and the purpose was to get discussion on the lecture the people had just heard from Father Creedon.

Exhibit 4

Excerpts From Grant Proposal of Catholic Charities of Arlington

IV.B. 3. INNOVATIVE FEATURES OF THE PROGRAM

1. *Outreach to Sexually Inactive and Pre-pregnant Adolescents*

Previously Catholic Charities of the Diocese of Arlington, Inc., has served only adolescents who were pregnant and came to the agency for services. This program will offer outreach to a group unserved by this agency in the past—the sexually inactive and sexually active adolescents at risk for becoming pregnant. Our engagement in a program to prevent pregnancies, rather than solely to deal with those which occur, is new for this agency.

2. *The Settings*

A family life/sex education program has not been held before in the Catholic Diocese of Arlington. Programs will be held in Catholic schools and religious education classes using church facilities. The project will document the problems, successes, and issues associated with implementing such a program in a large privately-sponsored school setting.

* * * * *

4. *Community Planning*

Two common reasons for opposing sex education courses among the Catholic community of Arlington and to a large extent by other religiously-oriented people and groups are the fear that such information will encourage adolescents to become sexually active, and the fears of parents that the values segment of the courses (if any, as many courses include no value judgments) will not support the values of church and home. The cooperation of church

leaders and parents in planning the program will assure them that the values they view as morally and socially acceptable will be incorporated into the presentations to be offered. The material will be an outcome of the project and available for adaptation by other agencies nationally. The National Family Clearinghouse of the Catholic University Family Center will support the dissemination of these materials.

* * * * *

VIII. DESCRIPTION OF CLIENT POPULATIONS TO BE SERVED, RECRUITMENT METHODS, AND SELECTION CRITERIA

The adolescents to be served are students in Catholic schools grades 7-12; and students in other schools who attend religious education classes in Catholic parishes in the Diocese of Arlington. The families of these students will be served as well.

Recruitment will be done through letters and visits to pastors, directors of religious education, school principals, parish, and school parents' groups, and others, as appropriate. Following this, letters will be sent to families whose adolescent sons and daughters attend the schools or religious education classes sponsoring the program.

We propose to begin with two pilot programs; one in a rural area and one in a suburban setting. Following completion and evaluation of the pilot programs, we plan to offer the course more widely.

These client populations were selected because: 1) they represent a group previously unserved by this agency; 2) it is from this group that most of the pregnant adolescents served by this agency come; 3) it is this group which most needs preventive services; and 4) we can find them gathered together at convenient times and places.

Exhibit 5

NEWS RELEASE
November 29, 1982

CONTACT: Elizabeth N. West
591-5921

BISHOP ANNOUNCES GRANT TO CHILDREN'S SERVICES

At the October 27th meeting of the Diocesan Priests' Council, Bishop Thomas J. Welsh announced that a grant of $75,000 has been awarded to the Children's Services Department of Catholic Charities of the Diocese of Arlington by the Office of Adolescent Pregnancy Programs of the U.S. Department of Health and Human Services.

The grant which may be renewed yearly for five years, is given for a new course in family centered sex education which will be offered to parish religious education programs after the first of next year. The project will be the subject of ongoing evaluation and research by a team from the National Center for Family Studies of Catholic University, headed by the Reverend Steven Preister.

High school age youth and their parents will be involved in the course which will include communication skills, values, factual information, consideration of the consequences of behavior, marriage and parenting. As federal grant money may not be used to teach religion, Charities staff will be coordinating efforts with pastors, directors of religious education and other Diocesan offices as appropriate to provide the religious dimension.

Elizabeth West, Coordinator of Children's Services and project director, says "We plan to consult with parents, pastors, parish staff and youth in the parishes in order to tailor the program to the needs of each."

Parishes wishing further information should call Father Gerard Creedon, Executive Director of Catholic Charities at 841-2544 or Elizabeth West at 591-5921.

Deposition Excerpts of
Anne Ridder,
Formerly Religious Education Coordinator,
Good Shepherd Catholic Church

[Direct Examination by Ms. Hunter:]

[8] A I'm a parishioner there.

Q What's the address of that church?

A The church itself or the mailing address?

Q Where is the church built and located?

A In the Mount Vernon Area.

Q How long have you been affiliated with the church?

A Four and a half years.

Q Now, was there a period of time when you were the Religious Education Coordinator?

A Yes.

Q When was that?

A From January 1980 until this past December 1st.

Q Was that a paid position?

A Yes, it was.

Q Was it a full-time position?

A Yes.

Q Were you employed by Good Shepherd Catholic Church prior to January 1980?

A Yes, as a part-time secretary.

Q How long were you employed as a secretary?

A September until that January period.

Q So, just for a few months?

A That would be about five and a half months.

[9] Q Did you receive any training for the job of Religious Education Coordinator?

A I have 18 years of volunteer experience and a Bachelor's Degree in Education. More currently, I worked on a Master's Degree at Georgetown University with an emphasis in Theology and Humanities.

Q Did you receive any specific religious training for the role of Education Coordinator?

A Not specific. You have an opportunity to go to workshops of interest. I have attended probably annually two or three workshops.

Q Are those workshops presented by the parish or Diocese?

A The Diocese, and there is an East Coast National Conference, because it is in Washington, that I attend annually.

Q Now, what has been marked as Ridder Deposition, Exhibit No. 2 is titled "Role of the Coordinator," if you could refer to your copy of that, is that a description of the position of Religious Education Coordinator at Good Shepherd Church?

A This was an initial job analysis prepared in the fall of '79 for anyone who would take the job and then it has (10) been marked up, as you can see, considerably. It was never officially revised. It, generally, would be a job description for that role and for the role I filled.

Q Did that job involve religious education functions for both adults and children?

A Yes.

Q Who was your supervisor in the job?

A The Pastor.

Q Who was the Pastor at the time that you were Religious Education Coordinator?

A Father Gerry Creedon.

MR. ARBOUR: Could you spell that for the Court Reporter?

THE WITNESS: C-r-e-e-d-o-n.

BY MS. HUNTER:

Q Did you work with any other staff employee at the parish?

A We have a Pastoral Team and that's the Pastor, Associate Pastor, myself, Liturgical Coordinator, Music Coordinator and the Secretary.

Q Who was Associate Pastor at that time?

A At that time Father George Griffin – well, when I started – and Father Pat Holroyd.

[11] Q How do you spell his last name?

A H-o-l-y – H-o-l-r-o-y-d.

Q Did you supervise any employees in that position?

A There is a part-time Secretary that staffs the Parish Center. She's ultimately supervised by the Pastor. She worked closely with the Liturgy Coordinator and myself. I was not her supervisor.

Q Who was the Liturgy Coordinator at that time?

A At that time Steve Miller and in the past year Tom Wilson.

Q Okay. Did you coordinate or work with any of the Religious Education Coordinators at other parishes?

A We have a diocesan group and we have bimonthly meetings. We don't work necessarily together in any programs. We met.

Q Would it be fair to say that your responsibilities in your job as a Coordinator included the facilitation of religious education that is consistent with the tenets of the Roman Catholic Church?

A Uh-huh – Yes, excuse me.

Q Did you supervise any volunteers?

A The word "supervised" would be inappropriate. I worked with volunteers and with the Volunteer Religious [12] Education Committee. The language – there's a lot of "implementing to assist" and "working together with." I was not in a supervisory role.

Q On the first page of Exhibit No. 2 under "Specific Responsibilities," the first responsibility, it reads "To encourage the role of the parents as prime catechists of their children." Is it your understanding that that is a principle of the Roman Catholic faith that parents should be the prime catechists of their children?

A That is of the National Catechetical Directory which is the American tenet or understanding of the

Catholic faith, and sharing it – That's the primary purpose of the catechist, to assist parents as the primary catechists.

Q Okay. Turning, if you would, to what has been marked as Ridder Deposition, Exhibit No. 3, if you would look at your copy of that same document?

A Yes?

Q Can you just briefly describe to me what this document is?

A This was prepared for the Religious Education Representative to the Parish Council. Each committee representatives was to provide a little nutshell explanation of their committee and this was the most concise way we could [13] share with the Parish Council the scope of the program and some statistics – you know, how many people are served. It is an over – a very brief overview of the Good Shepherd program.

Q When was this prepared, do you know?

A This would have been fall of '82 and then it was revised again, and the chairperson used it again in '83.

Q Now, if you would direct your attention to what has been marked as Ridder Deposition, Exhibit No. 4, which is titled "The Handbook for Catechists," first could you tell us for the record what the word "catechist" means in your understanding?

A It is another word for teacher. There is a little Greek in it that somehow in your teaching you are echoing in the student a shared faith and understanding.

Q Describe to me briefly, please, what this document is (indicating)?

A This we sent to new volunteers sort of as a welcome and we quoted quite a bit from the National Catechetical Directory about generally what catechists do, and then gave some specifics of what the parish would hope from a volunteer in the program and then listed the staff, and then important dates in the back.

[14] Q Referring to those important dates, do you know what year this was?

A This is—this one we gave out in the—this fall in '83. It is a rewrite of most of the—the center part is the same from '82 and then we changed the dates from the different programs.

Q So, this handbook or a very similar handbook was essentially prepared each academic year; is that right?

A Right. This is just the second time. We started it in '82 and then did it again this year.

(A document was marked as Ridder Deposition Exhibit No. 5 for identification.)

BY MS. HUNTER:

Q Showing you, now, Ms. Ridder, what has been marked as Ridder Deposition, Exhibit No. 5, do you recognize that?

(Handing to the witness.)

A Yes. Yes, that was a letter written after we had the first sex education high school program sort of commending Catholic Charities for their presentation and encouraging them, if they had time and could help us again, that we would be very eager to have that.

Q Have you ever written any letters other than this [15] one about the Catholic Charities Program?

A To Catholic Charities?

Q To anyone.

A I think I probably cosigned the letters—We sent a letter to the families of the high school students encouraging their participation. My name was probably listed as one. I haven't looked at the filing of—We have high school files and junior high school files at the parish, so I'm not sure how many letters there might be, but they were mostly to invite people to take the course.

Q Other than letters of invitation, have you written any other letters concerning this program that you remember?

A No, not that I know of.

Q I take it the letters of invitation are no longer in your possession; is that right?

A No.

Q But would be at the parish?

A If there are copies. I'm not sure what is in the high school packet piece by piece.

Q In this document, Exhibit No. 5, the first line refers to "High School Religious Education Program." Can you just describe to me generally what that is or was at this time?

[16] A The High School Program was—it combined seminars, this type of a seminar for this particular year, a class once a month, a small group class by group level, and then a once a month rally—what we called a rally where all four grades, nine through twelve, had a rally with a particular topic and that was held the first Sunday night of each month. So, they had—the teenagers would have the opportunity for a rally, a class and once a year some kind of seminar on a topic of interest and then they could also participate in the youth activities that were sponsored by the Youth Group.

Q All right. So, am I correct in understanding that the seminars occurred once a year in the high school group; is that right?

A A seminar format of some type during the four years I was there occurred.

Q So, every year there would be perhaps a different topic for the seminar; is that correct?

A Yes.

Q Were they done at approximately the same time of year every year?

A No. It moved around. The first year I think there were three seminars and they were Sunday afternoons. What we called a "seminar" was just a two-hour afternoon three times a [17] year. The next year we put the classes in

the fall and the seminar in the spring, and then this year we just had one seminar and it was originally scheduled just to be a three-session seminar. So, the format shifted each year with the leadership, because there is a High School Coordinator who works out their program, but it varies from year to year.

Q What were the topics of the high school seminars in the years that you were Religious Coordinator?

A They varied all over the place. We had a sexuality—the afternoon sexuality seminar one of the years. We had one on vocation, which was the single life, the married life, the religious life. If I thought long enough, I could remember. It was topics of interest to—Career choices, how to make a decision for a career.

Q I see, and the classes were held once a month; is that right?

A Yes.

Q Each class was on a different topic or there would be a series of classes on the same topic?

A By grade level. Each grade level had a theme for the year.

Q Okay. Who was the High School Coordinator?

A Which year?

[18] Q Well, for the year in which the Catholic Charities Program was presented, who was the Coordinator; do you remember?

A We had two. We had Ann Flynn, who started the year and had to resign in December of '82. Then there was nobody for several months and then Jean Rymiszewski resumed the role at the end of January and held it together until May, and then we had Connie Hollowell who took over from her.

Q Now, your letter says in the first paragraph that "This seminar builds on our previously successful but limited one-day sexuality seminar for high school students." By that sentence, did you mean that the

Catholic Charities Seminars built on the previous successful sexuality seminars?

A Uh-huh.

Q Okay, and when had the one-day sexuality seminars been held?

A Those were the ones I mentioned. They were in the afternoon, Sunday afternoon in—let's see—in '80 and '81. I'm not sure if they were fall or spring and there were two two and a half hour seminars in the afternoon.

Q All right. The first sentence in the letter says, "The year ends evaluation of our High School Religious Education Program includes the successful review of"—and it [19] goes on to mention the Catholic Charities Program. Was there a separate written document that was the year ends evaluation?

A For our whole program?

Q Yes.

A No.

Q So, when you use the phrase "year ends evaluation," you meant a sort of general contemplative review; is that correct?

A Right.

We have monthly education review meetings where we sit around and pat ourselves on the back and at the end of the year you sit around, and it is a May or June meeting normally, and you sit back and say what worked and what didn't work, what will we repeat.

Q This is meetings of what group?

A The Religious Education Committee.

Q How exactly did the Catholic Charities Program fit in with the Religious Education Committee's review of this program?

A Just that it came up as being something that was very good, a success that we were glad that we participated in.

Q Was it part of the Religious Education Committee's [20] Program?

A They sanctioned it or approved that we would have it.

Q When you say that, you mean the Religious Education Committee?

A Yes, uh-huh.

Q Do you remember the context in which that review happened?

Well, let me be more specific. Was this at a regular monthly Religious Education Committee meeting?

A Yes.

Q Who were the members of the Religious Education Committee?

A They—They are listed on this document here (indicating). Generally, they are chair program people.

Q To make sure we are talking about the same document, I believe that is Ridder Exhibit No. 3 (indicating)?

A Yes.

Q Okay. Go ahead.

A The Committee is composed of program chair people, liasons, program support and the leader is the person who is the chair person and rep to the Council, myself as Coordinator, two consultants and the Pastor.

[21] Q Okay. So, the only employees of the church who are on the Committee are yourself and the Pastor; is that correct?

A And the consultants are paid.

Q The consultants are paid. Are those full-time positions of the church, the consultants' positions?

A No. No.

Q Okay. Now, did you consider the sexuality seminar that was held in 1980/81 to be a successful program of the Religious Education Committee?

A Yes.

Q Was there any plan to repeat that program?

A The year that we were planning to repeat it was in this program year of 82/83, and we had proposed a three-session program that would include parents.

Q That was the year that you had the Catholic Charities Program?

A Yes.

Q So, in a sense the Catholic Charities Program was sort of substituted for the previously planned sexuality seminars and the Catholic Charities Program was sort of built onto that?

A Well, it built on it. We were moving from two two and a half hour afternoon sessions with just teenagers to [22] three sessions that would include parents. Then when I was in contact with the Children's Services Department for assistance we were able to even expand further and have them actually facilitate a program.

Q So, the Catholic Charities Program really enabled you to expand even more than you had planned to?

A Yes.

Q Had there been any sexuality seminars held at the parish to your knowledge since the Catholic Charities Program?

A We had had the six sessions and then had put in a request for the program for junior high school students and that was held in the fall.

Q Do you know how many teenagers attended your first sexuality seminar in 1980/81?

A About 40.

Q Do you recall how many attended the one when it was done by Catholic Charities?

A Let me see. About 70 families.

Q Right, and do you know how many attended the second Catholic Charities Program for junior high school students?

A I don't have a definite figure. It would be a guess to say about 40 to 50—no, it would be higher than that. Probably 70 or 80 families for junior high.

[23] Q Now, in the first sexuality seminar, who conducted the seminars? Who led them?

A Betty West would—

MR. ARBOUR: (Interposing) This is the first non-Catholic Charities one that you are referring to; is that correct?

THE WITNESS: I didn't understand. The seminar held prior to this one?

BY MS. HUNTER:

Q That's right. I'm referring now to the one held on Sunday afternoons in 1980 to '81.

A Those were conducted by the High School Coordinator, who would open it. Then we had—would invite a doctor. I guess one year it was just a doctor—a physician came. Another year there was a physician and a married couple, and I did not attend either of those seminars in full. I was there, I think, at the closing of both of them.

Q Can you tell me in general what the purpose of those seminars were and, again, I'm going to ask you a set of questions about 1980/81.

A This would be a very general review, because they were—like the '81 one was planned really before I was on board or had been conceived. The general idea behind it, as I [24] see it, was to offer in a peer setting in a very free setting an opportunity to learn more about total sexuality, the whole person, and we had been told by the teenagers they had some sex education in their high school, but that it was limited to a short period or often was girls with girls or boys with boys and they wanted a time when all the teenagers could be together and sort of a no holes barred, I want to know all about everything and no questions that we can't have answers to, that was the intent, and to be put

in a setting of trust that perhaps with their high school program they wouldn't feel.

Q Would it be correct to say that the presentations at this high school seminar were consistent with the tenets of the Roman Catholic Church on sexuality?

MR. HIRT: I object. I think you are leading the witness and I don't know that anyone can define what consistent with the tenets of the Catholic Church means. Certainly, there has been no foundation laid that she is an expert in the teachings of the tenets of the Catholic Church whether they be unitary, regional or diverse.

MS. HUNTER: Well, for the record, I think that her position as Religious Education Coordinator and her understanding as has been reflected already to be implicit in that position gives a foundation for the question, but I will [25] rephrase the question.

BY MS. HUNTER:

Q Was the sexuality seminar in 1980/81 part of the program of the Religious Education Committee of the Good Shepherd Church?

A Yes, they approved it.

Q When you say, "they," do you mean the Religious Education Committee?

A Yes, uh-huh.

Q Was it part of your job as Religious Education Coordinator to implement the program that that Committee approved?

A I didn't personally implement it. The high school chair person did. I saw that it happened and was assisting in any way that was needed.

* * * * *

[70] Q Okay. Now, did Father Creedon speak to the group at any time during the Catholic Charities Program?

[71] A One of the sessions was set aside just for his presentation, which was not a part of quote "their program."

Q Did you attend that session?

A Yes.

Q Did he address that session with everyone in one group? Was that true for the time that he addressed that session?

A Yes.

Q Were there other presentations made during that same session?

A They broke following his presentation. The groups broke into their usual groups and I don't know if the followup was related to his presentation or was a separate small group discussion format.

Q Who conducted the small group discussions?

A The same facilitators who had been working with the group.

Q The Catholic Charities' facilitators?

A Yes.

Q What did Father Creedon say during his presentation at that time?

A He gave an overview on—his opening premise was 'You want to know the church teachings on sexuality.' He put [32] it right back in there laps and said, 'You are the church. You people sitting here are the body of Christ. The teachings of you and the things you value are, in fact, the values of the Catholic Church.'

Then he clarified his position and said that whenever he spoke, it had to be remembered that he spoke as an individual and that he was—you know, there are no quote "teachings of the church" that he was going to, you know, read off in a list, but he as a member of the church, as everyone else, wanted to cover topics that had surfaced as being of interest. Then he touched on a number of topics that had been raised as questions in the course of the seminar and gave his opinion and reminded the people that they would be free to—they could talk to another pastor of another denomination or another pastor of

another church who may have a slightly different view, but what he talked about was the values that he all felt we held in common in terms of sexuality and relationships and problems.

He talked about societal problems and, you know, why society tries to gather together and help one another through difficult times. He did not—I know he talked about living together, because that's very much on teenagers' minds. They have brothers and sisters that are living together, and he [73] said that they have to have compassion and understanding, you know, even if something seems not to be right. He discussed homosexuality in very general terms and, again, you know, expressing a nonjudgmental attitude.

Q When—

A (Interposing) It was a cautious kind of presentation, because he had—he was relating not only to parents, but to the youth and encouraging an interplay between them. He alone was not going to stand up and be—it was not an instructive type of presentation.

Q When you say "living together," by that do you mean a man and a woman living together and having a sexual relationship, but not being married; is that right?

A Not being married, right.

Q Is that what you are referring to?

A Yes.

Q On the topic of homosexuality, did Father Creedon convey that homosexuality—active homosexuality is not to be encouraged or supported?

A He did not give an opinion. He just recognized that it is a problem of concern to society, that there are many ways to look at it, that the church including all of us has to deal with it in compassionate ways and be supportive of people [74] which need help in that area.

* * * * *

[120] Q Let me ask you one more question about Father Creedon's speaking.

A Yes?

Q I believe it was your testimony that one session was set aside, but you used the term that this was not part of quote, "their program." What did you mean by that?

A They had no responsibility for preparing that night. They could come or not come.

Q Who is "they"?

[121] A The Children's Services Group for the presentation. They didn't have to prepare a presentation or prepare for him. He was the prime presenter that evening.

Q In terms of the December meeting that you described, was there any discussion by the Catholic Charities people about what the role of Father Creedon would be in this program?

MS. HUNTER: Could you clarify what December meeting you are talking about?

MR. HIRT: December '82, I believe, the planning meeting.

A The planning meeting. I don't think we discussed his role, per se. It was agreed at some point – and I don't know if it was then or before that point – that one of the sessions would be a presentation by the Pastor.

BY MR. HIRT:

Q Okay. What individuals from Catholic Charities, if any, said anything that led you to believe that this was not, quote, "part of their program"? Can you recall a conversation by Ms. West of Ms. Mudd or –

A (Interposing) Is just what I would assume. You know, if he's one, it's not my night to have – to present anything.

[122] Q By "my night," you mean who?

A You know, if it is the Pastor's night to give a presentation, I'm assuming that Catholic Charities thought they

didn't have to prepare anything programmatically. They did leave for that evening a segment of small group discussions that they had prepared for, but they were not responsible for any part of his presentation.

Q Okay. When Father Creedon spoke, from your direct testimony I believe you said something to the effect that he spoke as an individual. Could you recall precisely what he said to characterize how he was speaking and what role he was speaking in?

A Again, this is just from memory, but at any time he speaks he makes it very clear he's speaking as Jerry Creedon, whose vocation is priest, but he's speaking as an individual and not for a particular group or the Diocese of Arlington or any – but, there are sure times in his role with other groups or maybe in behalf of a committee or in behalf of something that he does, but he always outlines that 'I'm speaking on behalf of a group,' or 'I'm speaking as an individual.'

This particular night he said, "I'm speaking as a baptized Catholic and Christian, Jerry Creedon. These are my views."

* * * * *

[127] Q I think I have one or two more questions for you. Let me just make sure.

In terms of the presentations by Reverend Creedon, were there any prayers during the course of those sessions that you recall?

A I would like to honestly say there was or wasn't. It would seem logical to me that he would have probably closed with some sort of prayer closing.

Q But is it your testimony that you don't know one way or the other?

A I don't know.

MR. HIRT: That's all the questions I have.

MS. HUNTER: I have a few questions on redirect.

FURTHER EXAMINATION BY COUNSEL FOR THE PLAINTIFFS

BY MS. HUNTER:

Q Ms. Ridder, you testified, I believe, that you had heard Father Creedon speak numerous times before the Catholic Charities Programs; is that right?

A Most every Sunday.

Q On a number of those occasions, he had identified [128] himself as speaking as an individual; is that right?

A Yes.

Q So, what I'm getting at is his presentation in Catholic Charities Program was not the first or only time you ever heard him present himself that way; is that correct?

A No.

MR. ARBOUR: Is that correct?

THE WITNESS: Oh, yes, that is correct.

Exhibit 5

GOOD SHEPHERD CATHOLIC CHURCH
3321 WESSYNTON WAY
ALEXANDRIA, VIRGINIA 22309

June 27, 1983

Dear Mrs. West, Coordinator – Catholic Charities
Childrens' Services,

The year-end evaluation of our High School Religious Education Program *includes* the successful review of the six session Parent/Teen Sexuality Seminar planned, moderated, and facilitated by Catholic Charities Childrens' Services. This seminar built on our previously successful but limited one day sexuality seminars for high school students.

Our initial request on Sept. 16, 1982 stated, "We hope that at least 75 families – parents and teens – would take part in an extended series that would include basic sexuality information (anatomy, physiology,) gender identity, development of relationship, communication skills, ethical choices and responsible decision making. It is our hope that such a seminar would enhance previous information the student might have received through school or community sexuality courses since it would be situated and presented in a church setting and be family oriented in its format."

The Seminar provided by your Childrens' Services department in conjunction with our parish advisory group *met* and *exceeded* our initial hopes for such a seminar. Positive feed-back by participants and an overall parish interest in this first extended seminar on sexualitly pointed out the overdue need for such a seminar to be sponsored by the parish.

Over 70 families with their high school sons and/or daughters attended the sessions. It is noted that the highly qualified Childrens' Services facilitators were furthered trained to function as a team to implement the plan for each session. This additional, specialized sexuality preparation certainly enhanced the overail program. The immediate evaluation following each session by the facilitators and parish advisory group provided useful sharing of ideas, reactions and led to long range planning. The facilitators were flexible to our parish needs and adapted the seminar plans as it progressed to meet these needs.

Parents of junior high students made early requests for a similar seminar to be planned for them in 1983-84. The parish religious education committee values the quality of sexuality education that Childrens' Services is able to provide and plans to utilize this professional service in our community in its planning for grades 7-12.

It is our hope that your funding is continued so that with your assistance we can continue to offer youth and their parents the most current, accurate, and challenging material to help them communicate and grow together as healthy, happy, and responsible individuals and families.

Thank you for your professional/educational involvement with our parish. May it continue!

Sincerely,

/s/ ANNE RIDDER
Anne Ridder,
Religious Education
Coordinator

Deposition Excerpts of
Linda Ann Cullen,
Case Worker, Children Services Department of
Catholic Charities Diocese of Arlington;
Group Facilitator, sexuality program
offered by Catholic Charities

[Direct Examination by Ms. Hunter:]

[46] Q Were all the programs conducted in buildings owned by the church?

A To the best of my knowledge, yes.

MS. HUNTER: Let's mark this as Exhibit 1.

(A document was marked as Cullen Deposition Exhibit No. 1 for identification.

[47] BY MS. HUNTER:

Q I'm showing you what's been marked as Cullen Deposition Exhibit 1. Can you tell me what this is?

(Handing to the witness.)

A Yes. This is the opening welcome speech, which Mrs. West usually gives, but which at St. Anthony's I gave because she was out of town.

Q Who wrote this?

A Mrs. West.

Q When was it given to you?

A Prior to the beginning of the St. Anthony's course.

Q Is this the only time that you have given this particular welcoming presentation?

A Yes.

MS. HUNTER: Would you mark this as Deposition Exhibit 2?

(A document was marked as Cullen Deposition Exhibit No. 2 for identification.)

BY MS. HUNTER:

Q Showing you now what's been marked as Cullen Deposition Exhibit No. 2, do you recognize that document?

(Handing to the witness.)

[48] A Yes, I do.

Q What is that?

A The outline of the program to be given at St. Anthony's.

Q Could you just look at it for a minute and tell me if that's an accurate outline of the program that you were involved in at St. Anthony's to the best of your recollection?

A Yes, it is, although some of these activities may have been deleted. I can't quite recall. We do often run into timing problems and have to cut short a particular activity.

Q Okay. Could you look at the second page of this outline, the very bottom, and it says, "November 3rd—Program to be planned by St. Anthony's Advisory Group." Can you tell me what that sentence means?

A It means that the St. Anthony's Advisory Group, after we concluded, wanted to have a session separately to deal more specifically with any religious aspects of sexuality.

Q Do you know whether that session was held?

A Yes, it was.

Q Did you attend that session?

A No, I did not.

[49] Q Do you know who did attend that session?

MR. ARBOUR: Who did?

MS. HUNTER: Who did, yes.

MR. ARBOUR: Just in general?

MS. HUNTER: Yes.

A Any members of St. Anthony's or the community that might want to, in general, I suppose could attend it. My guess would be mostly the participants who participated in our program attended.

BY MS. HUNTER:

Q Do you know who did the presentation at St. Anthony's on November 3rd?

A You mean who was the speaker or whatever?

Q Yes.

A Father Gene Schnipky, I believe.

* * * * *

[56] Q Okay. Now, if I could direct your attention to the penciled Page 4 of Deposition Exhibit 4, the last activity that's listed on that page says, "Students write questions anonymously." Was that one of the activities that you used at St. Anthony's?

A Yes.

Q Can you explain to me briefly what that was, what they were told to do and what the questions were about?

A Okay. They were told to complete their tests and then before they left for the evening to take the three by five index cards, which we had provided them, and to write a question about anything regarding sexuality that they would like to have answered and to put the cards in the shoe box provided as they left.

Q Has this been done at each of the programs that you have been a facilitator at?

A Yes.

Q What happens to the cards?

A They are then taken out and all the questions are typed, and it is distributed to both the teens and the [57] parents. These are the questions that the participants in the program have and either the question will be answered in the course of the program or we'll provide a written answer for those that are not covered, or if they pertain to religious matters, they will be handed over to the person who was going to conduct the program when we leave, the religious consultant.

Q Has that process been followed in all the programs so far?

A Yes.

MS. HUNTER: Could we mark this as Cullen Exhibit No. 5?

(A document was marked as Cullen Deposition Exhibit No. 5 for identification.)

BY MS. HUNTER:

Q I'm showing you what's been marked as Cullen Exhibit No. 5. Do you recognize that document?

(Handing to the witness.)

A Yes. It is Questions and Answers from one of the programs. Oh, it says, "Good Shepherd" at the top.

Q Were these the questions that were compiled by the procedure that you just described? In other words, these were the teenager's questions—

[58] A (Interposing) Or their parents.

Q (Continuing)—or their parents?

A Yes.

Q Who compiles the questions?

A You mean who types them onto here (indicating)?

Q Yes.

A We take the cards back to our office and the secretary takes each three by five card and then types it and then throws it away.

Q You said earlier that the questions that were religious were referred to the session at which a religious presentation was made and they were not answered. Who makes the determination about whether or not a question is religious?

A I would say specifically Betty West and Pat Mudd, although if there were a question they might ask other facilitators who might be there.

Q Who writes the answers to the extent that there are substantive answers?

A Usually Betty West and Pat Mudd.

* * * * *

[61] Q Now, let me show you what has been marked as Cullen Deposition Exhibit No. 6. Do you recognize this document?

(Handing to the witness.)

A Yes, I do.

Q What is this document?

A The questions from the participants at St. Anthony's and the answers to the ones not previously covered.

Q Was this document prepared essentially by the same process that you have previously described for the others?

A Yes.

Q Now, on the first page of Document No. 6, the second question, is that the question that you were thinking about earlier with regard to tampons?

A Yes.

Q Do you remember that?

A Uh-huh.

Q So, the answer there was the product of some [62] discussion among the facilitators?

A Yes, and I might give some background. We reworded the question a little bit, because the young lady that answered that—

MR. ARBOUR: (Interposing) That asked it?

A (Continuing)—that asked the question actually worded her question—rather than "some people say," she said, "My mother says decent girls aren't supposed to use them," so, the discussion as to the answer was how to give the information and yet at the same time should we change the questions to "some people" to protect the confidentiality, and we did do that and we were aware in the answering of the question that it was her mother who told her that decent girls don't use tampons.

BY MS. HUNTER:

Q Directing your attention to the last sentence in that answer, "For example, acceptance of tampons is documented in Fundamental Marriage Counseling—a Catholic Viewpoint." Those last few words, the beginning letters

are capitalized. Is there a document called, "Fundamental Marriage Counseling – a Catholic Viewpoint"?

A I really don't know.

Q Can you tell me what it refers to?

[63] A No.

Q Do you have any recollection from your participation in formulating the answer?

A The only part of the answer that I was involved in were the discussions regarding, as I previously mentioned, whether to change the wording of the question and to be sensitive to the fact that it was this girl's mother who in fact was giving this girl this information.

Q I see. So, you don't have any knowledge about what this reference is in the last sentence of that answer?

A No.

Exhibit 6

QUESTIONS – ST. ANTHONY' PARISH COURSE

1. I am curious about the idea of female masturbation. I am not sure how that goes.

   Female masturbation is the self stimulation of the genital organs, primarily the clitoris to produce sexual excitement and often orgasm.

2. Is it bad to use tampons? I know there are dangers like toxic shock; some people say decent girls aren't supposed to use them.

   Toxic shock syndrome is a rare disease believed to be caused by the bacteria Staphylococcus. In 1981, 85% of cases reported were to menstruating women using tampons. Young women seem to be more susceptible to this disease. The incidence of toxic shock syndrome is 17 cases per 100,000 users. Symptoms are a sudden high fever, vomiting, diarrhea, rash, dizziness or fainting. The use of tampons in an individual decision. However, if you choose to use tampon, they should be changed every 4 to 6 hours. Young women who have never had intercourse have a natural opening in the hymen (the membrane covering the opening to the vagina) that allows room for the insertion of a tampon. Some cultures may object to the use of tampons as they are opposed to women touching their genitals. The subject of tampons and virginity has been investigated by religious authorities in this country with resultant approval of the use of menstrual tampons. For example, acceptance of tampons is documented in Fundamental Marriage Counseling – A Catholic Viewpoint.

3. What do you think is a sufficient amount of time for a young couple to be engaged before they get married?

   An engagement is a pledge to marry. The wise couple uses the engagement period to get to know one another well and to evaluate their relationship. There are many issues which need discussion and resolution. The time needed to be ready to marry may relate to how long a couple knows one another previous to the engagement and how will they communicate. Many advise that six months is a reasonable time.

4. Why does one parent listen or talk more openly with his or her child?

   Most parents want to talk openly to their children. However, communication skills come more easily to some than to others. There are courses available in the community, such as P.E.T. and S.T.E.P. which can help to improve communication in a family. Communication is a two way street. Teens, as well as parents, can take some responsibility for encouraging open sharing of feelings in a family.

5. How does natural birth control work?

   When using natural birth control, a couple avoids sexual intercourse during the time in the woman's cycle when she can become pregnant. A woman ovulates, or releases an egg, about fourteen days *before* her period. Most experts suggest a woman avoid intercourse during the possible period of ovulation. Advocates of "Natural family planning" point out that it is important to go beyond the old "rhythm" or calendar method of calculating fertility and also it is important to be alert for signs of ovulation by noting the changes in a woman's basal body temperature and in her cervical mucous. This method of birth control does require [ILLEGIBLE].

6. Once kids have become sexually active do they usually continue to be?

   Not necessarily. Many teens who are called "sexually active" have intercourse once or very infrequently. Some find the experience disappointing. It depends on the individual and his/her relationships, values and experiences.

7. When a man comes in a girl, how long is it before the sperm gets to the egg?

   This can happen in a matter of a few hours, if the egg is in a fallopian tube. Sperm are capable of swimming at a rate of one to three centimeters per hour, unassisted.

8. Is it normal to have sex in awkward positions?

   Any position which pleases the couple is "normal".

9. It is physically bad to have sex?

   No, unless you contract a sexually transmitted disease.

10. What are the dangers of marrying too young: i.e., prior to finishing high school and/or college?

    When you marry very young you may be too immature emotionally for a long term committed relationship. In adolescence, you are still a rapidly changing individual. Your likes and dislikes, your perspective on life, your goals and interests may not yet be stable. Being young and inexperienced, you may be unaware of all the opportunities and possibilities life has to offer you, so you may soon regret having closed off many of your alternatives. Also, persons who marry too young rarely have enough money to support themselves adequately. It's hard to he happy when you're worried about paying the rent or having

enough food, putting gas in the car, etc. The divorce rate for teen marriages is very high.

11. What do you tell a daughter if she is really devoted to a boyfriend why she shouldn't have sexual relationships with him (discounting the religious reasons)?

    You might explain to her that you don't want her to get hurt; emotionally, if the relationship breaks off, or physically if she should contract a sexually transmitted disease. If a pregnancy ensues there will be serious consequences physically and emotionally. You might ask her if she is ready to handle the responsibility for all this? Is her boyfriend ready? Have they even discussed all the possibilities?

12. How available are birth control pills?

    Pills are available, however they must be perscribed by a doctor, either through a clinic or privately.

13. Does it hurt when you have intercourse?

    Normally, voluntary intercourse should not hurt. If a girl has a very small opening in the hymen, first intercourse may be uncomfortable. If a woman is not relaxed because of fear, nervousness, etc., intercourse may be painful.

14. Can you get V.D. from oral sex?

    gonnorhea of the throat (gonnorheal pharyngitis). The chance of syphilis may appear on the mouth or elsewhere on the skin.

15. How long does it take for the sperm to travel up the tube?

    A very short time. See question 2.

16. What exactly is a hysterectomy and how much do they cost?

    A hysterectomy is a surgical removal of the uterus. You would have to consult a surgeon about the cost, as it would depend on the reason for the operation, the difficulty of the procedure and the number of days for which hospitalization would be required.

17. What does it feel like to have sex?

    If one has intercourse in the context of a loving committed considerate relationship it feels very pleasurable. If the relationship is not one of love and commitment or if the partners are not considerate of each other, if the circumstances are such that the act is hasty and furtive, the experience may be very disappointing.

18. What are the kids being told about homosexuals?

    We haven't really dealt much with homosexuality in this course, although it will be dealt with in our last session. We would say that 1) no one really knows the cause of homosexuality, 2) a homosexual cannot usually be "cured", i.e., made into heterosexuals through psychotherapy 5) homosexuals have the same civil rights as persons with heterosexual or asexual preferences and 6) it is hurtful to make fun of, or otherwise persecute homosexual persons.

19. If you love someone is it OK to make love?

    Previously answered. What do you think now that you have had this course?

20. Is masturbation morally wrong (Catholic Church)? Why?

    Religious consultant will answer this question.

21. How far can you go on a date (morally) without having intercourse?

    Religious consultant will answer this question.

22. Is it bad to have six orgasms during sexual intercourse?

    No, but it would be unusual.

23. What do you do when you get a girl pregnant?

    Get help. Don't try to deal with this alone. Talk to your parents. Catholic Charities is available to help young people in this situation to explore the alternatives for themselves and for the baby, and to see that you get the kinds of resources you will need.

24. How do you get rid of herpes?

    There is presently no cure for herpes. The virus "hides" in the victim's body between attacks, but never really goes away.

25. Is it true that when you get wasted, that the devil enters your body?

    Religious consultant will answer this.

26. Is rock music evil?

    Religious consultant will answer this.

27. Are there as many birth controls for men as for women? What are they?

    No. The condom is the only male contraceptive available at present. There is some research going on to develop a birth control pill for men.

28. What is V.D.?

    V.D. is venereal disease. The current term for venereal disease is Sexually Transmitted Diseases or

    STD's. For further details read the pamphlet distributed in this course.

29. What is S & M?

    S and M stands for Sadism and Masochism. Sadism is sexual pleasure from inflicting pain, Masochism is sexual pleasure from being hurt. Sadists and masochists often change roles, one time being the one who inflicts pain, another, being the one who is hurt. This is not considered to be very common nor normal.

30. What is oral sex?

    Any combination of mouths and genitals.

31. What is the normal sperm count?

    40,000,000 to 100,000,000 sperm per c.c.

32. How does abortion kill an unborn child?

    There are several different ways.

    1. Fetus is removed by a electric suction machine.
    2. A sharped curved curette (surgical knife) scrapes away the tissues of the baby. If baby is large enough, head is crushed with forceps and body is dismembered.
    3. Salt solution kills baby in uterus.
    4. Synthetic hormones start labor when baby is too young to survive delivery.
    5. Baby is removed surgically and killed or left to die.

Deposition Excerpts of
Jean M. Larson,
Formerly Youth Group Coordinator
at Good Shepherd Catholic Church

[Direct Examination by Ms. Hunter:]

* * * * *

[48] Q Okay. Now, if I could redirect your attention, if I might, to the original notes that you took that I believe you [49] testified that you took on Father Creedon's presentation, and that is Deposition Exhibit No.—

MR. ARBOUR: (Interposing) Seven.

MS. HUNTER: Seven, thank you.

BY MS. HUNTER:

Q These were notes that you took on the evening of February 22, 1983 about the presentation that he made that night; is that correct?

A That's correct.

Q Why did you take these notes?

A For my own personal records.

Q Did you take notes on other presentations that were made?

A No, I don't think I did. I was going to take them on Doctor Azcarate's, but I did not.

Q The first word there that says "feedback," can you tell me what does that mean for you, that notation?

A I don't recall. I would have to guess.

Q Sort of halfway down the page it says, "Bible versus Canon Law." Do you recall what that note signified?

A No. I guess I don't take very good notes.

Q The next notation reads "Is church against all abortions—yes, in general." The next word, I believe, is [50] "T-e-l-m-a"—

A (Interposing) No, "dilemma."

Q "Two lives involved." Is it your testimony that that word is "dilemma," and I was misreading it?

A Correct.

Q Okay. Farther down the page there is four lines that begin with the phrase "Birth control—okay—responsibility," and then a reference two lines down to "American Bishops." Tell me what the next word is.

A "Diminution of guilt."

Q Can you tell me what was meant by that notation and what you recall he said along those lines?

A That in the birth control issue there is room for individual conscience and a sense of responsibility.

Q What did you mean by the reference to "American Bishops"?

A I don't recall.

Q Do you recall what you meant by the notation "Diminution of guilt"?

A No, I don't.

Q The next line is a notation as to "Chastity—responsible sexual behavior." Do you recall what that notation means—

[51] A (Interposing) Yes. That was his definition of chastity.

Q And the next page is a continuation of your notes on the same presentation; is that right?

A That's correct.

Exhibit 5

SEXUALITY SEMINAR PLANNING SESSION
WEDNESDAY, DEC. 8, 1982 – 7:30 P.M.

1. Opening Prayer and Introductions – Anne Ridder.
2. Resource, Program Proposal – Children's Services of Catholic Charities – Betty West
3. Review of Good Shepherd's Previous Sexuality Programs – Anne, Fr. Creedon and Pfeifers.
   a. Content, Format, Schedule
   b. Recommendations for additions or deletions from previous programs.

* * * * *

7. Closing Prayer – Fr. Creedon

Exhibit 6

NOTES – FIRST PLANNING SESSION – SEXUALITY SEMINAR, W DEC. 8, 1982

BACKGROUND: Betty West, Director of Children's Services of Catholic Charities, outlined her proposal and reception of a Federal Grant to facilitate sex education in light of the problems of teenage pregnancy. Media, statistics, research materials, training of facilitators in the area of sex education are among the many resources made available by her office and its grant. Pat Mudd, who works in conjunction with Betty, is willing to assist with our parish project.

Fr. Creedon, Anne reviewed the past three years' inclusion of sex education seminars, course content, special programs that were part of the high school's evolving curriculum.

GROUP BRAINSTORMING FOR CONTENT OF PROPOSED SEMINAR:

INFORMATION: to be given to both parents and students

consequences
sexuality and reproduction – physical, emotional, psychological
human growth and development – stages, different "speeds" of growth
making choices
developmental needs of teens
psychological dimensions of sexuality
Facts and Statistics
gender identity
contraception – types, statistics, health consequences
"living together" – effects, statistics, consequences
(further information may be shared based on the use of a "question box" during sessions)

ATTITUDES/VALUES – points to be raised, discussed

- dare to be different
- o.k. to say "no"
- dealing with peer pressures
- parental expectations – "double standard"
- shared responsibility of sexes – roles, female and male
- responsible choices – media, reading, TV, etc.
- sex symbols, stereotypes
- role models – self perception
- attitude awareness – faithfulness, tenderness, toward life, toward body, toward persons (used, being used), commitment

SKILL DEVELOPMENT:

- communication – parents, teens
- friendship
- affection – how to express it
- evaluation of what you see, read
- how to prepare *now* for the future – marriage (faithfulness, hard work)
- intimacy

RELIGIOUS CONTENT:

- procreation
- grace of marriage, of all sacraments
- permanency of marriage
- contraception?
- living together?
- trust/faith/love
- ideals
- chastity
- covenant/contract

GOAL SETTING: Drawing from the shared ideas of participants a goal was formulated that included these points – to give information, to share values/convictions so kids can make enlightened decisions.

GOAL: To give information and to enable the sharing of values and convictions within a family and church community context so that teens and their families can communicate more openly and can make enlightened decisions about relationships.

NAMING SEMINAR: Many titles were shared

Former course titles –

- Human Sexuality
- Lifetime Choices
- How Do I Know I'm Doing Right?
- Is Teenage Love Possible?

Course title selected –

- "Are You Ready?"

NEXT STEPS:

- Schedule was adopted as shared
- Tuition of $15. for any new students
- Children's Services providing leadership workshop Jan. 4-7.
- Next planning meeting – Tues. Dec. 14 – 7:30 p.m.
- Teen census – mailing describing course, Jan. 6

PLANNING COMMITTEE –

- Betty West, Pat Mudd – Catholic Charities
- Fr. Creedon, Pastor
- Anne Ridder, RE Coordinator
- Carl Pfeifer, Janaan Manternach, RE Consultants
- Tony and Jean Rymiszewski – High School Chairpersons
- Connie Hollowell, Joan Gros, Charles Chambers – Catechists
- Jean Larson – Youth Coordinator
- to be added – teen members

Exhibit 7

Fr. Creedon

Feedback

Backwards – Situation then Value
Integrating (We)
Planned Sequence

Church is the people of God

Law – Values
God – Christ
Fear – Love
Absolute – Situation
Dependency – Responsibility
Prohibition – Challenge/Invitation

Bible vs. Canon Law

Is church against all abortions – Yes, in general. Dilema – 2 lives involved.

Overpopulation – Economic Justice

Birth Control – okay – responsibility
Exercise responsibility in practical terms
Am. Bishops – diminution of guilt.
Room for conscience.

Chastity – responsible sexual behavior.

Pre marital sex – wrong – intercourse implies commitment. Lack of mature relationship.

Homosexuality – need to be expressed with care & responsibility. As in heterosexual Pastoral care need for people of this orientation.
Provide family value be sensitive.

Masturbation – in general not sinful.
Seen as readying for intimacy
Can be expression of interversion – particularly in marriage.

Exhibit 12

SESSION IV

FEBRUARY 22, 1983

7:30 – 9:00

7:30 – Father Creedon lectures on values of the Church and community.
8:10 – Break into individual groups.

Discussion Questions – Parents

Parents discuss how Catholic values fit into their lives.

1) What are you telling your teens about premarital sex?
morality?
consequences?
Does this fit with presentation given by Fr. Creedon?
Do you think the Church gives you the help and support you need?
How could the Church be more helpful?
2) Are you comfortable explaining your values to your children?

Discussion Questions – Teens

Teens discuss how Catholic values influence their final decisions RE: Sex

1) What are your parents' ideas about premarital sex?
2) Are they telling you? Do you just know how they feel?
3) What part does religion play in you making decisions about sexual matters?
4) Do you get enough guidance from your Church about sexual behavior?

8:30 – Values Voting – Parents
Who's Responsible – Teens

February 22, 1983 – 7:30 – 9:00 PM

DISCUSSION QUESTIONS – FR. CREEDON

1. Is it possible for a high school student to have sexual intercourse responsibly?
2. Is the church against all abortions?
3. What is the Church's View on overpopulation?
4. What is the Church's Teaching on birth control? Is it right or wrong?
5. What is chastity?
6. What does the church say about premarital sex?
7. What does the church say about homosexuality?
   Is homosexuality a sin?
   Should homosexuals be allowed to teach school, have gay rights parades, etc.
   Does the church have a ministry to homosexuals?
8. Is masturbation sinful?

Deposition Excerpts of
John Charles Lothamer, Jr.,
Minister of Religious Education and
Family Life Minister, St. Mark's Catholic Church

[Direct Examination by Ms. Hunter:]

[17] Q Okay. Now, prior to the time that Catholic Charities operated its program at St. Mark's on sexuality education, had there been any previous programs in that parish that dealt with the issue of sexuality?

A Yes.

Q Can you describe them to me?

A They took place on several grade levels. They were [18-19] a part of our curriculum in our Religious Education Program.

Q How many years had such programs been ongoing?

A Probably five.

Q Okay. Can you describe generally what those programs were like? Were they a series of sessions, one day sessions, films or –

A (Interposing) They were generally what was called "a unit." Two or three sessions involving class time and at least one parent meeting.

Q So, these were conducted as part of the church school; would that be fair to say?

A Right.

Q Was a unit on sexuality typically included every year in certain grade levels?

A It would have been kindergarten, third grade, fifth grade and junior high and something in the high school, but I'm not as familiar with the high school program.

Q But for those grade levels you just specified, there would be a unit every year on sexuality?

A Yes.

Q Is that practice continuing? Are there still those units?

A Yes.

[20] Q Other than those regular units in the Church School Program, have there been any other programs on sexuality sponsored by St. Mark's?

A There would have been a high school program, the details of which I fail to remember.

Q Would they be part of the Church School Program or more like sort of special seminars like Catholic Charities Program?

A No. Those original ones would have been part of the church program.

Q All right, and how was the presentation of sexuality treated in the Church School Program in such a way that it was part of a Religious Education Program?

A Well, first of all, it took place in the regular Religious Education time as part of the curriculum. There were specific church teachings that would be referred to in the teacher preparation and presentation.

Q What materials were used, do you know?

A The names of them?

Q Yes.

A Bensinger would be one name that comes to mind as a publisher. The particular program that we used had sort of a pro life theme to it, anyway, and that was the Silver-Berdett [21] Program and we used the Accordian Series from St. Louis.

Q Can you tell me what the primary themes are in Religious Education insofar as it includes sexuality information?

MR. HIRT: At his parish?

MS. HUNTER: Yes.

THE WITNESS: The focus?

BY MS. HUNTER:

Q The themes or focus, yes.

A I suppose under the underlying theme under them would be a positive regard for human sexuality, that it is a created gift from God, that for any of the flaws that exist

in it it has been redeemed by Christ. Those would be sort of underlying themes.

Q With regard to the issue of abortion, is there a theme that would be present in Religious Education as it was done at St. Mark's?

A Yes. I'm just trying to think where we explicitly talked about abortion. It would be in the upper grade levels, but it would be made very clear the teachings of the Catholic Church's position, which would be against abortion.

Q And with regard to methods of contraception, the teaching that was part of the Religious Education Program at [22] St. Mark's?

A Well, the general teaching was that the church was against artificial contraception.

Q What about sexual intercourse prior to marriage? Was there a—

A (Interposing) Specific teaching?

Q Yes. What was that?

A That the church was against premarital intercourse.

Q What about homosexuality, what would have been the teaching of the church with regard to that?

A Yes, that the homosexual condition is neutral, that homosexual acts are considered wrong.

Q Those teachings would be reflected in the materials that were used in that Religious Education Program; is that right?

A In upper grade levels, the ones that you are talking about.

Q How are the volunteer—I assume there are volunteer teachers?

A Right.

Q How are the volunteer teachers in that program trained to convey these teachings?

A They were given resource materials and teacher's [23] meetings were held, and each grade level has a coordi-

nator, a master teacher who helps prepare the lessons.

Q I believe you said the units, at least at some levels, would typically include at least one meeting with parents; is that correct?

A Yes.

Q Is there a Catholic principle or tenet as to the importance of parental guidance on the issue of sexuality?

A Yes, primary.

Q What is that?

A That the parents are primarily responsible for educating their children in sexuality and that we would facilitate that, but, in fact, the most important teachings are left to the parents.

Q Would it be fair to say that the church in its Religious Education Programs encourages the parents to convey their own religious beliefs concerning sexuality to their children?

A Their own religious beliefs as opposed to—

Q (Interposing) That the church encourages parents to inculcate religious beliefs concerning sexuality in their children; would that be correct?

A Yes, uh-huh.

[24] Q Can you tell me, generally at least, where in Catholic Doctrine that belief as to the importance of parental guidance comes from?

A The Constitution of the Church, the Second Vatican Documents—the Documents of Vatican II, and also the Declaration of Education from Vatican II.

MS. HUNTER: Would you mark these, please?

(Eleven documents were marked as Lothamer Deposition Exhibits 3 through 13 for identification.)

BY MS. HUNTER:

Q Now, to your knowledge was the program for St. Mark's—I'm talking now about the Catholic Charities Program—how was that planned? How was the contents of it planned?

A The Catholic Charities people recommended that we draw together an Advisory Board of parents and teenagers who would be involved in the program and that we sit down and discuss goals, and that's how, you know, St. Mark's sort of tenure to the whole thing developed.

Q Was there an Advisory Group established?

A Yes.

Q Who was on that Advisory Group?

[25] A I have the names listed somewhere. I don't know. In some other—

It is there at the bottom of it (indicating). There it is. (Showing to counsel.)

Q Okay. All right. The Advisory Team consisted of three adult couples and four teenagers; is that true?

A Yes.

Q Was there anyone else on the Advisory Team?

A I was.

Q All right, and was there anyone other than yourself?

A Not that I recall.

MR. HIRT: What are you reading from for the record?

MS. HUNTER: It has been marked—wait a second. I'm reading from Deposition Exhibit No. 6.

MR. HIRT: Okay.

BY MS. HUNTER:

Q What participation did the Pastor of the church have, if any, in the planning of Catholic Charities Program?

A I believe he was at one of the planning sessions reviewing the film that Catholic Charities was going to use, and I was not present at that particular showing.

Q How many planning sessions were there?

[26] A I think there were three.

Q Did you attend two of the three?

A Yes.

Q What happened at the planning sessions? Can you generally tell me?

A The members of the team were basically asked what they would see their goals as being, and this was especially directed at the parents, I think, at first. They were asked if this kind of a program was going to exist what would they be hoping would be included in the program, and it eventually kind of filtered down to what the teens wanted themselves.

Q Do you recall what goals were established?

A Well, I think they are outlined somewhere, but precisely, you know, I couldn't recall.

Q Do you recall whether the Catholic Charities personnel submitted any of the curriculum materials or course materials to the Planning Committee at this stage; that is, prior to the time the program was actually implemented?

A I believe they didn't. I'm pretty sure.

Q Were all the members of the Advisory Group members of St. Mark's Parish?

A Yes.

Q I'm showing you what has been marked as Deposition [27] Exhibit 3. Can you tell me what that is?

(Handing to the witness.)

A That is a Bulletin announcement made after the masses on Sunday, Saturday evening and Sunday morning.

Q This announcement concerns the Sexuality Program that Catholic Charities was going to offer; is that right?

A Right.

Q This was announced by whom?

A Whoever was celebrating the mass. So, it could have been announced by as many as four different priests

Q Do you know how many times it was announced by the priests?

A It would have been announced seven times.

Q Okay. Was there any discussion at the Advisory Group Meetings of the religious nature or whether religious contents would be incorporated into the Catholic Charities Program?

A Yes, there was discussion.

Q What was that discussion?

A I think there was a concern, particularly from the adults, that there be some kind of religious content. I mean, that was an initial response of theirs, but it had already been explained to them that it could not be included in the [28] Catholic Charities Program and the people were willing to accept that limitation.

Q Was there any other response made to that concern? Was there any attempt made to adjust the program so as to incorporate that concern without violating what Ms. West had earlier communicated to the group?

A Yes. I think it was determined that the parish would handle that part – that concern it had separate from the Catholic Charities Program.

Q What do you mean by that?

A That somebody on the staff would – if there was a concern for church teachings, that somebody on the staff would do that separate from the program.

Q From where did that resolution come?

A I think that was clear from the very beginning that that's what would have to be done. I don't remember if somebody suggested it or where the idea came from.

Q What I'm getting at is at the very beginning of these discussions, was it already understood that somebody from the staff would handle the religious discussions –

A (Interposing) Yes, somebody from the staff would handle that. That was clear.

Q How was that to be done in the context of this [29] Catholic Charities Program?

A Do you mean like who was going to handle the religious contents?

Q Yes. Answer that.

A Okay. It was decided that one of the priests would give a talk and, basically, I would be the one in charge of that particular session.

Q That would be at one of the sessions of Catholic Charities?

A No. It was to be distinct. To me it was a technicality, but they were very insistent on it and so we held to that.

Q Why to you was it a technicality?

A Well, from my own philosophical viewpoint, I had no problem with it, but I realized there were legal implications and so I went along with what was recommended.

Q How was it to be presented? That is, how was the religious presentation to be done?

A Father Hortum was to give a talk on it. He was to field all questions and handle all discussions.

Q When was this talk to occur?

A It was to be after the program was finished. It was a follow-up.

[30] Q As a follow-up to the program?

A Right.

Q Was it to be at the same time; that is, the same day of week and the same time of day as the rest of that program?

A It was to follow the sequence of Wednesdays.

Q So, on a subsequent Wednesday there was to be a presentation by Father Hortum; is that correct?

A Right.

Q Do you know whether in fact that presentation occurred?

A Yes, it did.

Q Did you attend?

A Yes, I did.

Q Did you attend all of the sessions?

A I was present in the building at all of them. I attended most of them—most of the sessions.

Q Let me show you what's been marked as Deposition Exhibit No. 4. Do you recognize that?

(Handing to the witness.)

A Yes.

Q What is that?

A Let's see. This is a letter to—I think it is an initial letter to the parents of freshmen and sophomores.

[31] Q And it went out with your signature on it?

A Yes.

Q Why did you send this letter?

A To get this information to the parents that the program was being offered.

Q This was sent out, it appears, about slightly more than three weeks prior to the time that the program was to actually begin. Is that your reading of the dates on here?

A Yes. I think the program ran in May, as I recall—Yeah, the end of April.

Now, this was a letter I devised and I got the schedule wrong, by the way.

Q How did you get the schedule wrong?

A For some reason or other we switched around the teachings of the church part and I can't remember how that evolved, but it did.

Q At the time that you wrote this letter, the sessions on the teachings of the church was scheduled for what appears to be the next to the last session; is that correct?

A Right. Right.

Q And that, I take it, was accurate at the time you wrote the letter or—

A (Interposing) I believe so.

[32] We had a lot of discussions as to whether to do Father Hortum's presentation in the first part, at the middle or the end, but what was clear was that it was a distinct and separate presentation.

Q I see. How exactly was it going to be distinct?

A That the Catholic Charities staff would not participate in any way in terms of producing or presenting a follow-up to the talk.

Q Directing your attention to the second paragraph of your letter dated April 5, and it is a listing of the issues to be covered, is that an accurate description on your part at that time of what you believed the issues to be?

A Yes.

Q All right, and this was sent to whom exactly, Mr. Lothamer?

A It was sent to approximately 150 families whose children would have been freshmen and sophomores in our program.

Q Were these families who were registered with the parish?

A They are at least registered in our Religious Education Program, and in the parish – we have some families in the program not necessarily registered in the parish.

[33] Q All right. Did it go to any family who was not either in the Religious Education Program or was not registered in the parish?

A No.

Q Let me show you what has been marked as Exhibit No. 5. Can you tell me what this is?

(Handing to the witness.)

A This was a follow-up – let me see. I'll read it over.

Well, as it says, it is a reminder and also added to it was the fact that it had been opened up to juniors and seniors in the parish as well as freshmen and sophomores.

Q Did this go to the same mailing group?

A It went to the same mailing group, in addition to families of juniors and seniors.

Q I see. I show you what's been marked as Lothamer Exhibit No. 6, and you might note that in Exhibit No. 5 it refers to the "enclosed survey form"?

(Handing to the witness.)

A Yes.

Q Is this the enclosed survey form that went out with Exhibit No. 5?

A Yes.

[34] Q Did you send this out?

A I sent it out.

Q Did you prepare it?

A It was prepared by Catholic Charities – well, they asked us to send it. I don't know exactly who prepared it.

Q But it was furnished to you in this form by Catholic Charities?

A Yes.

Q What was the purpose of it?

A I think to get some feedback to make sure we were on the right track in terms of the planning that we had done. They may have had other reasons why they wanted the information in terms of their own research, but I was not clear on that.

Q Was any compilation done as a result of this survey?

A No, not by St. Mark's.

Q Did you simply turn over the completed forms to Catholic Charities?

A Yes.

Q Just for the record, on the second page of Exhibit No. 6 at the bottom, that is the Advisory Team that we mentioned before; is that correct?

A Yes.

Q Those are the identities of the adults and [35] teenagers; is that correct?

A Right.

Q Now, I apologize that this is out of order, but let me show you what's been marked as Lothamer Exhibit No. 12. What is that?

(Handing to the witness.)

A That's a Bulletin announcement regarding the program.

Q Which date do we have—

A (Interposing) I have April 10.

Q All right. April 10 is No. 12. I believe on the last page of that exhibit there is a box in the lower right-hand corner. Is that a part of the publicity that was done for the Sexuality Program?

A Yes.

Q Similarly, Exhibit 13, that's also a Church Bulletin, is it not?

(Handing to the witness.)

A Yes.

Q One week later?

A Yes.

Q And in the same place on the third page of that exhibit there is another ad, as it were, for the program; is [36] that right?

A Right.

Q Was there any other written publicity, other than the documents that we have just identified, that publicize the Catholic Charities Program?

A Yes. I realized that I didn't bring one Adult Ed. brochure, which the Bulletin refers to and that would be basically identical to the April 10 description in the Bulletin.

Q Was there any other publicity?

A No.

Q Now, this Bulletin, as with the last two exhibits, how was that distributed? Is it distributed by mail, by hand or—

A (Interposing) By hand.

Q Okay, and is it distributed to the persons who attend services at St. Mark's?

A Yes.

Q Does it go to anyone else?

A Anyone who attends—no, it is not mailed out.

* * * * *

[38] Q What was done with this course outline?

A This was handed out to the participants at the first session.

Q Can you explain to me on Page 2 of the outline what [39] the last sentence refers to?

A That refers to Father Hortum's talk.

Q Was it explained orally to the people who came to the first session what that last section referred to?

A Not specifically that last sentence.

Q Well, was it explained to them that Father Hortum would give a presentation?

A Yes.

Q Were they informed about the date and time of the presentation?

A I can't remember, but I assume they were.

Q To the best of your recollection, these were all done on Wednesday night, is that right, and they are, obviously, all one week apart; is that true?

A Yes.

Q Was Father Hortum's presentation in fact given on a Wednesday night after the last one that's on this exhibit?

A I think, in fact, what happened was he gave his talk in the last hour of May 25th. The program stopped at something like 8:30 in terms of Catholic Charities and they sort of left the—turned the program over to him.

Q I see.

A And he gave the talk.

[40] Q I see. So, his talk was actually on May 25th. All right.

Were you present for his talk?

A Yes, I was.

Q Who conducted the program at St. Mark's Church?

MR. ARBOUR: Is this the Catholic Charities Program?

THE WITNESS: While Catholic Charities was running the program?

MS. HUNTER: Yes.

A Betty West.

BY MS. HUNTER:

Q Was she assisted by other persons?

A There was a team.

Q Do you remember who any of the members of the team were?

A I remember some of them. Pat Mudd I remember. I can't remember the names of the other team members.

Q Where was the program actually held?

A It was held in what is called the all purpose room.

Q Can you tell me where that is?

A Well, it is in St. Mark's plant – facilities.

* * * * *

[43] Q Showing you what's been marked as Lothamer Exhibit No. 8, can you identify that?

(Handing to the witness.)

A It was a bibliography that we made available to the families at the sessions.

Q Who prepared the bibliography?

A That came from the Religious Education Office of the Diocese.

Q The title at the top of the first page is "St. [44] Mark's Human Sexuality Program." Does that refer to the Catholic Charities Program?

A It refers to what was in the Bulletin – yes.

Q My question is, was this ever passed about by the church prior to that time?

A Oh, sure. In fact, I think I took this from my file. So, this came from a separate department.

Q So, this has been used in the Religious Education Department regarding sexuality before?

A Yes, right.

Q And it was distributed at the program that was run by Catholic Charities; is that correct?

A Yes, and I ran it off.

Q The contents of it were prepared at the Diocese level; is that right?

A Yes.

Q Do you recall whether this was distributed during the Catholic Charities Program?

A I suspect it was made available – everything was made available to the people. They weren't always handed out at the first meeting.

Q Were there any other materials that your office furnished that were made available to persons who participated [45] in the Catholic Charities Sexuality Program?

A Other than this outline which I just made available?

Q Yes.

A I can't recall anything else that came from St. Mark's.

MR. HIRT: Excuse me. By "this outline," are you referring to something? I don't know if it is marked or not marked.

MR. ARBOUR: Exhibit No. 7.

MS. HUNTER: Yes.

MR. HIRT: Okay.

BY MR. HUNTER:

Q Does this exhibit reflect in part a religious perspective on the subject of sexuality?

A Yes –

MR. HIRT: (Interposing) Which exhibit are you referring to, so the record is clear?

MS. HUNTER: Thank you. Exhibit 8.

A (Continuing) – Yes, it does, and I took it upon myself to prepare it and in the sense of deciding when to hand it out.

[51] Q Directing your attention to the session of May 25, 1983, I believe you testified that that was the session in which Father Hortum spoke; is that correct?

A Yes.

Q Did you attend that session?

A I guess I did.

Q Did you hear his presentation?

[52] A Yes, I did.

Q Can you describe for me, to the best of your recollection, what that presentation was?

A He spoke kind of about self-image and life as a gift, as I recall, and he talked about emotions and human development and he talked about the mystery of relationships, and he answered the questions, 'How far should you go?'

MS. HUNTER: Off the record.

(Discussion off the record.)

BY MS. HUNTER:

Q What did he say?

A He said, 'For teenagers, you should go as far as a kiss and no farther.'

Q Did Father Hortum answer any other questions that were on the written question and answer sheet?

A Yes, he did.

Q Do you recall what any of those were?

A One was on abortion, I'm sure, and he stated the church's position on abortion, which is against it. I think I recall there was a question about homosexuality that he answered.

Q What was his answer, do you recall?

A On homosexuality, basically, that the homosexual [53] state was a given for some people that had to be accepted and that the church's position on homosexuality dealt with the acts of homosexuality, which it was against.

Q Do you recall any other questions that Father Hortum answered?

A I can't.

Q You stated just a couple of minutes ago that he said, as part of his presentation, that life is a gift or he described life as a gift. Can you describe what you mean by that?

A He was describing it in terms of—as a mystery that we don't fully understand, that we have a calling to grow and mature and that we should accept that gift with responsibility.

Q Did any of the parents or teenagers leave prior to Father Hortum's presentation?

A Not that I was aware of.

Q Did the Catholic Charities staff persons leave?

A I know they planned to leave and I can't remember. I do believe that Betty West was present and I can't remember about the rest of the—but they did not participate in any way, that I'm certain of.

Q From your observation of the series of sessions at [54] St. Mark's Church, was the May 25th session pretty much attended by the same people who had been at the other sessions?

A Yes.

Q Do you recall about how many teenagers and parents participated in the program?

A There were 50 families. I think we had approximately 125 participants.

Q Is there anything else that you recall about Father Hortum's presentation and the contents of it?

A Not other than what I told you.

Q Do you recall whether he was dressed in clerical garb or dress?

A Yes, he was. He had a collar on.

Exhibit 4

St. Mark's Church
9970 Vale Road (Box 997)
Vienna, Virginia 22180
Telephone 281-9100

April 5, 1983

Dear Parents and Freshmen/Sophomore Teens,

Beginning the last Wednesday in April and going through the four Wednesdays of May, St. Mark's will be co-sponsoring with Catholic Charities a Family-Centered Human Sexuality course for Freshmen/Sophomore teens and their parents.

This program hopes to foster more open communication between teens and parents around the issues of human sexuality; personal values, social values, church teachings, psychological and biological realities, friendship, dating, and the consequences of choices.

A parent's advisory group has met with the staff from Catholic Charities to help determine St. Mark's needs. Several teens have been invited to give input as well. This advisory group has entitled the program: *And Now For the Rest of the Story.*

The course will be given at St. Mark's on these five dates. All sessions are held from 7:30–9:30 p.m.

Wednesday, April 27	Introduction, The Ground Rules. The Ideal Parent. What Questions Need Answering.
Wednesday, May 4	Information about Sexuality
Wednesday, May 11	Relationships, Dating
Wednesday, May 18	The Teachings of the Church
Wednesday, May 25	Decision Making, Consequences.

* * * * *

Sincerely,
/s/ JACK C. LOTHAMER
Jack C. Lothamer, MRE

Exhibit 8

"Glossary of key Terms and Definitions"
Used in Human Sexuality Class

human life begins. The female is now pregnant. This new life will not seek to implant itself in the wall of the uterus where it goes through a nine-month process of development called pregnancy.

23) The fertilized ovum is called a zygote. After about two weeks of growth in the uterus, the zygote reaches the stage where it is called an embryo. By the eighth week, the embryo develops to the point where it is described as a fetus. From the eighth week onward to birth, the developing baby is described as a fetus.

An amniotic sac forms around the embryo. This membrane is filled with amniotic fluid so that the developing embryo is cushioned in a "bag of waters" until shortly before birth.

The embryo is attached to the amniotic sac by what is called a body stalk which eventually develops into the fetus's umbilical cord. The umbilical cord attaches the fetus to the placenta, which is attached to the mother's uterine wall. The fetus's nurture passes from the mother's body through the uterine wall to the placenta and from there to the fetus by way of the umbilical cord.

At birth the amniotic sac breaks, discharging its fluids. The placenta detaches from the uterine wall and is discharged after the birth—hence, its descriptive name afterbirth. The doctor clamps and then cuts the umbilical cord from the newborn baby. The scar marking where the umbilical cord had been attached to the baby is what we term the navel.

24) Even when conception does take place, there are many reasons why a newly conceived life does not develop to full term. Full term means the end of the

normal nine-month process of development from conception to birth. One such reason is premature birth. This means that the mother gives birth prior to the full term of intrauterine development. This full-term, or nine-month, development is described in terms of trimesters, or three-month periods—hence, the first trimester, the second, and the third.

If birth takes place during the third trimester, the infant has a good chance of survival. During the second trimester, it is possible, but more unusual, that the baby can survive and complete its normal development outside the uterus. If the fetus (zygote or embryo) is ejected from the uterus during the first trimester, it is described as a miscarriage, rather than a premature birth, since it is impossible for the fetus to survive. In many instances of miscarriage, the zygote or embryo had already died within the uterus and is thus discharged in a process similar to menstruation.

A miscarriage is also described as a natural abortion, not to be confused with an artificially induced abortion. A premature birth, miscarriage, or natural abortion can occur for a wide variety of reasons. A physical accident or medical problems like genetic defect or dietary deficiency are often causes.

25) The opposite of premature birth, miscarriage, or natural abortion is induced abortion. This is a deliberate intervention to prevent the life conceived from developing to full term and being born. Whether this takes place hours after conception or is delayed until the third trimester, it is considered by the Church as the killing of a human being. (To kill is the physical act of depriving another of life. To murder is a moral term, indicating that the life of another was taken with unjustifiable reason.)

Induced abortion is not automatically immoral. In special cases, for example, such an abortion might be the unfortunate but necessary result of a surgical attempt to rid a woman of cancer. Today, in developed countries, such cases are relatively rare.

Induced abortions can be achieved in various ways. One of these is through abortifacients. These either directly attack and destroy the fertilized ovum before it is implanted in the uterus or, more often, they render the uterus incapable of receiving and sustaining the newly fertilized ovum. The new life dies as a result. Certain contraceptive devices are abortifacients. They act to destroy a fertilized egg rather than to prevent fertilization from taking place. For instance, the IUD (intrauterine device), a small metal or plastic device placed within the uterus, may be an abortifacient.

If the fertilized egg succeeds in becoming implanted in the uterus and begins to develop, a variety of other means can be employed to abort (stop) the new life. Certain chemical compounds can be taken orally or injected directly into the uterus, killing the embryo or fetus and producing a miscarriage. Surgical means can also be used to kill and then remove the zygote, embryo, or fetus.

26) Sterility, the opposite of fertility, is the condition in which either the male or female is unable to effect a conception through intercourse. This state can be brought about through surgery. Sterility can also be the result of physical accident or illness. A male's testicles could be destroyed, rendering him sterile. A woman's ovaries could become cancerous, rendering her sterile. Illness or hormonal imbalance can make it impossible for the male to produce sperm or the female to produce mature ova. Some forms of sterility can be surgically or medically corrected, others cannot.

27) Two major sex hormones, estrogen and testosterone, chemicals produced by the body, play a very important part in the individual's physical development, sexual development, sexuality, and sexual functioning. Estrogen is the female hormone, though some of it is found in all males. It is essential to such things as fetal development, development into sexual maturity, the menstrual cycle, and fertility. Testosterone plays a similar role in the male and is present to some degree in females. A hormonal imbalance, like too much testosterone in a female, can result in male characteristics like developing excessive facial hair. A similar imbalance in the male, as occurs when the male is castrated, can include the loss of facial hair and even the development of the breasts. Today it is possible, in most cases, to treat such hormonal imbalances medically.

28) Venereal disease, or VD, is any of a number of diseases that are transmitted primarily, but not always exclusively, through sexual intercourse or similar sexual contact. Most of the known diseases can be cured through medication like antibiotics, especially if diagnosed in their early stages. However, doctors have observed that certain strains of VD, like gonorrhea,

Deposition Excerpts of
John D. Hortum,
Associate Pastor/Parochial Vicar,
St. Mark's Catholic Church

[Direct Examination by Ms. Hunter:]

[11] Q Now, the Catholic Charities Family Life or Sexuality Program was held at St. Mark's Parish in approximately April to May of 1983; is that right?

[12] A That's right.

* * * * *

[15] Q What I'm asking is whether there was discussion then or at any time about how the Catholic Charities Program would sort of fit into what the parish had already been doing in terms of sexuality education?

A Right. I can vaguely remember that there had been – there are certain grade levels where sometimes there had been some components of religious education which may have touched on sexuality, and they decided this would be good for another level.

Q What do you mean exactly by "another level"?

A Perhaps people who hadn't – Well, I think as I recall what had been – there had been some components of sexual education at the junior high level and at this point it was decided it would be good to do something at the senior high level.

Q So, the Catholic Charities Program sort of filled a spot which the church had identified a need for, but hadn't [16] filled itself; is that right?

A I think –

MR. HIRT: (Interposing) I think you should not try to put words in his mouth, but let him try to state his own understanding.

A (Continuing) – I think what happened is we heard that this program was available and it sounded good, and we were deciding then whether to do it. I don't think there was actually any possibility of fitting in into our

schedule—fitting it into our program, because they had already had a program set up.

BY MS. HUNTER:

Q Had someone in the church identified that need; that is, a need for a sexuality program for high school level students?

A I just remember people talking about it as a general need.

Q Okay. Would it be correct to say that the parish or the church has a position that sex education for its young people, generally, is a positive thing to do?

A I would say that it is hard to ever personify a whole parish. I would say this is what this parish thinks.

Q Well, was it part of your understanding of the [17] program of the parish as you were employed to carry out the program?

A I think, generally, in talking with parents—in talking with anybody, there seems to be a real felt need for a good sex education program.

* * * * *

[20] Q Now, I believe we have established that you did give a presentation at some point for this group of persons. Do you recall when you gave that presentation?

A It was the last—on the last—The Sexuality Program went for five Wednesdays and there was a point at about the last—oh, 35 to 40 minutes on the last night after they had finished that I made that presentation, and I think it way May 25th. Yeah, May 25th.

Q Did everyone stay for your presentation?

A I don't remember. I didn't take attendance. There was a—the last thing I recall that they had done was in small groups, and then there was an announcement that I would do my part in it.

Q Were you dressed in your clerical garb that night?

A I don't usually around the parish, but I think I probably did, though. I can't remember.

Q Just to clarify, how did it come about that you were the person selected to give this presentation?

A Well, originally there had been a discussion that one or the other of the priests would do it. I think what happened is that Father Cassidy went to a subsequent meeting [21] after that and got more involved with it and decided he was going to be the one to do it—or it was decided at that meeting which I wasn't at. Then, it turned out he was going to be out of town and so I stepped in.

Q I see. So far as you understood, how far in advance did you know you were going to be the person? Was it sort of from the beginning of it?

A No. It would have been during the program.

Q Did you say from the beginning?

A No. During the program.

Q Were you introduced or do you remember when you stood up to speak what happened immediately prior to that?

A I don't know. I can't remember.

Q Had you made any kind of welcoming statement or had you stood up to speak at any time before you stood up to give this presentation? Do you remember?

A No.

Q Did the people there, so far as you could tell, seem to expect that you would be giving this presentation? I mean, did people know in advance that you would be giving this presentation?

A Yes, it seemed that people had an idea that after the Catholic Charities Program there would be a time to talk [22] about religious values.

Q Did you yourself make any of the announcements prior to the beginning of the program; that is, announcements to parishioners at services or at any other time, saying this is going to be happening?

A Well, the announcements were in the Bulletin and I cant remember if there were pulpit announcements, you know, at the end of mass.

Q Do you remember telling anyone before the program actually started about the program, that it was actually going to be happening?

A Not specifically, no.

Q Did you have any conversations with anybody prior to your presentation about what the contents of it would be?

A Apparently, at the first session there had been a number of questions that people had been allowed to make, anonymous questions about anything they wanted to ask and that included anything that had to do with religious values at all or church doctrine. Those questions were compiled and given to me and I'm pretty sure they were given to me by Betty West.

Q Do you remember what form they were given to you in?

A Just a typed sheet of paper, as I recall, and I can't find it.

[23] Q Did Betty West tell you anything else about your presentation? What was your discussion with her other than, 'Here's a typed list of questions'?

A She just said, "I want to see what you are going to do with this."

* * * * *

[27] Q Do you remember how you did the presentation and what the structure of it was?

A It was very informal and it involved pretty much an opening statement about—that a lot of times we are looking for church authority to give the answer and I compared that with the way Jesus was often asked, 'Okay, how far do I have to go,' and things like that in life and that nobody else could decide for you, but the church was there for helping people make the best decisions.

Q And this was done in the fellowship hall of the church?

MR. HIRT: Excuse me?

BY MS. HUNTER:

Q. I said, this was done in the fellowship hall of the church?

A Actually, we call it the multi purpose room.

Q I'm sorry. In the multi purpose room of the church?

A Right. It is attached.

Q Why don't you just tell me what you remember saying after that introduction?

[28] A Then I went into some of the questions and there were some reactions from people, specifically more from parents than from the students, and they—even though I was specifically speaking about how we need to be making our own decisions and that somebody else making a declaration could be taken as an authority in such a way that they were not deciding about their own life, it turned out they finally wanted me to say something about what I believed as far as sexuality among unmarried teenage people. So I—I said, 'They're looking for moral guidance, a moral statement about morality,' and that's what I talked about.

Q Let me ask you these questions. You said there were reactions from parents?

A Uh-huh.

Q Reactions to what?

A Really, different questions like the—there was—for instance, this is an example, there would be one or two or three questions about homosexuality that the students had given and the parents—in my response to that question, I talked a lot about prejudice and just among—because that's a big thing among the teenagers. You put something down and you call it "gay." So, I said, "Let's look at this," but the parents were actually saying, "Let's get back to the morality [29] of the situation and talk about sin." So, then I would have to take about sin and how sin—it is something where I know my own sin, but I can help guide

somebody else if I have to and I can do that with very, very specific moral teachings, but sin is my own personal moral commitment.

Q Is that statement that you just said about your responsibility towards the question of homosexuality, is that consistent with the teachings of the church as you understand them?

A Right. The teachings of the church can sometimes be interpreted to say that such and such a thing—a categorical act can be considered a sin, but when making that statement it is being made in a very abstract way, because every time you talk about sin you have to get back to individual conscience.

Q And that's part of the teaching of the church, getting back to an individual's conscience; is that right?

A That's correct.

Q Were there any other reactions from parents that you remember?

A Well, it did get to a point of 'Okay. Now, you said that you have all these moral niceties and things. Now, what about how far can you go,' that type of thing and that was the tenor of that kind of thing, because that's what these people [30] are really after and that's what they wanted to know. That made me think about the beginning, but the whole deal was nobody else makes that decision for you. But, I said, "If you want to talk personally about it, I can say, if you want to make a moral abstract statement about the way I would see things, I would think that it would be—would be—I could say that being sexually active as a teenager could be a moral wrong."

Q Was that response that you made consistent with the teachings of the church as you understand them?

A Yes.

Q Can you remember any other reactions from parents?

A There were a number of questions that just seemed to go along with things and those were the ones I remember as saying—those were the ones I remember, because they probably made me go a little deeper into a subject.

Q You said earlier that parents or that people there were asking you sort of what you believe; is that right?

A Well, they knew—I said that we can talk about is—we can talk about a doctrine of the church, a moral teaching of the church and take that as authority and then not have more discussion, but we all have to take the doctrine of the church and then take it as a guideline and [31] then find ways of integrating that with our own lives, which are going to be unique. So, in that discussion they wanted—so, they knew they weren't going to just get the doctrine from me and so what they were looking for probably was 'Okay, what is the doctrine through what you believe?'

Q Is that sort of giving what you believe sort of integrating with church doctrine, is that part of your ministry—generally part of your ministry?

A It is usually more part of a ministry in a more pastoral setting than as a teaching type of thing on an individual basis.

Q Did you hand out any materials when you did your presentation?

A No.

Q Were there questions that the students asked you at the time? I understand you were answering questions that were given to you and you mentioned some things that the parents said. Do you remember anything the teenagers said?

A As far as I remember, I may have elicited a question, but you really had to drag them out because it was hard, because the parents were right there. They had asked the questions by writing them down earlier and that's what they felt.

[32] Q Did you say anything about the role of parents in transmitting their beliefs about sexual activity or sexuality?

A I think I just talked – I talked in general about how we affect each other as parents and as children and about how we are living our lives and enjoying our sensuality and sexuality.

Q Is it part of the Catholic Church's teaching, as you understand them, that parents do have a role about transmitting religious beliefs, including sexuality beliefs, to their children?

A Yes.

Q Is that considered important in the Catholic position on sexuality education?

A Absolutely.

* * * * *

[37] Q How did you integrate religious beliefs and teachings in talking about that?

MR. HIRT: Is it something that he did? I don't think he testified to that.

MS HUNTER: Counsel, I believe he testified he made a religious presentation.

MR. HIRT: That is not the same thing as your last [38] question, to say the least.

MS. HUNTER: You can answer the question.

A I think that I based it all on Jesus Christ. That's the way I do things and that that was the context of talking about love and about what can I offer, how to receive and give love to other people.

BY MS. HUNTER:

Q Did you refer to Jesus in your presentation?

A Yes.

Q Were there other ways in which you integrated the ideas or teachings of the Catholic Church in the presentation?

A Just whenever – whenever a subject would come up, I would probably have a statement that 'If you just want to know within the Catholic tradition, you can always find a moral teaching about just about anything and that it was possible to find a sentence that said a particular thing was wrong, for instance, and yet what we had to do was deal with that as a rule – as guidelines in our lives.'

Deposition Excerpts of
Sister Elyse Staab,
Administrator, St. Ann's Infant
and Maternity Home

[Direct Examination by Ms. Hunter:]

[22] Q The Center for Life is one of the subcontractors under the grant, is that right?

A Yes.

Q How did they come to be selected for that?

A I asked them.

Q What was the basis on which you asked them or the reason why?

A One of the requirements in the legislation was that family planning services be provide as an important service, and I contacted the Center for Life to ask if they would do that part of the grant.

Q Why did you contact that organization?

A Well, I knew that they worked with adolescents in some of their other programs, also our young women deliver at Providence Hospital, so it was a natural.

Q Is the fact that they are affiliated with a Catholic Hospital one of the considerations that you used in selecting them as a subcontractor?

A Perhaps.

Q Did you consider selecting, for example, a planned parenthood organization as a subcontractor?

A No.

Q Why not?

[23] A As I recall, the legislation prohibits any abortion counselling and that is one of the services that planned parenthood would offer.

Q Had the legislation not prohibited that, would you have considered them as a subcontractor?

A Probably not.

Q Why not?

A For the same reason.

Q Because they provide abortion services?

A Yes.

Q Is that because of the Roman Catholic belief that abortion is morally wrong?

A Well, it is part of St. Ann's philosophy, that we do not provide abortion counseling, so it would not be in keeping with our philosophy. Also, I might add that at the time that a young women applies to St. Ann's for services, that is not an issue because she has decided to carry the baby to term and she is asking for residential placement.

Q But I believe we are focusing now on selection of a subcontractor to provide family planning services. Is the St. Ann's philosophy that abortion is wrong reflective, as you understand it, of the Roman Catholic belief that abortion is wrong?

[24] A Yes.

Q What was your understanding at the time that you prepared the grant application in 1982 of the services, the family planning services offered by the Center for Life?

A My understanding is that they would provide classes as per their outline, which was included in the grant.

Q Did you solicit that outline from the Center for Life?

A Yes.

Q Had you ever seen, prior to that time, any of the Center for Life program materials for adolescents?

A No.

Q Had you ever sat in on any of their classes or presentations?

A No.

MS. HUNTER: Would you mark these as Sister Elyse Exhibits 1 and 2?

(The documents referred to were marked Sister Elyse Exhibits Nos. 1 and 2 for identification)

BY MS. HUNTER:

Q If you will, look first at what has been marked No. 1. Do you recognize that document?

[25] A Yes.
Q And what is it?
A It was part of the original grant application that was filed.
Q And if you would look at what has been marked Exhibit No. 2, do you recognize that document?
A Yes.
Q What is that?
A It is a letter that I wrote to Marjorie Mecklenburg, subsequent to the filing of the application, in which I sent in additional information for clarification of information that was sent previously.
Q And the attachment to Exhibit No. 2, or, rather, part of Exhibit No. 2, in part, reflects a revision of the family life education component grant that is described in Exhibit 1, is that right?
A That is right.
Q Directing your attention in both exhibits to the pages that are numbered at the bottom 40 and 41, in Exhibit 1 the objectives of the contraception module are described as to present complete information on the nature and function of the most common contraceptive method, to present information both on the advantages and medical hazards of common contraceptive [26] methods and discuss the advisability of contraceptive use among adolescents. In Exhibit 2, the objectives are listed as to present factual information on the nature and function of the most common contraceptive methods, to present information on the medical hazards of common contraceptive methods and discuss the inadvisability of contraceptive use among adolescents. Can you explain for me why those particular revisions were made?
A Because Exhibit 2 reflects more what the program is doing as opposed to Exhibit 1.
Q Whose idea was it to make the changes?
A I suppose it was mine.
Q And why did you decide to have the changes made?

A Because I didn't feel that what was stated in Exhibit 1 was actually what was going to be presented.
Q What was your basis for that belief?
A I just knew that it wasn't.
Q How did you know?
A Based on my discussions with Bob Hutson.
Q You are referring to Mr. Hutson, who is Director of the Center for Life?
A Yes.
Q Who drafted this section of Exhibit 1 that we are [27] referring to?
A I don't know. It came from the Center for Life. I don't know which individual did it or proposed it.
Q Who drafted the section in Exhibit 2?
A I don't know. Again it came from the Center for Life.
Q Did you contact the Center for Life to indicate that what is in Exhibit 1 should be redrafted?
A Yes.
Q What did you say when you contacted them?
A I said that I didn't think it reflected what we had discussed that was to be presented in the classes.
Q Was your understanding that the correct emphasis of the Center for Life program was a more negative emphasis on the usage of contraceptives?
A I don't think that is the major emphasis of the Center for Life program.
Q Do you think it is one emphasis of it?
A Possibly. But not the major emphasis.
Q With regard to the revisions that are reflected in these two documents, is that one of the things that is communicated in the revision of the language there?
A I am sorry—would you say that again?
[28] Q Is the emphasis on the negative aspect of contraceptives one of the things that is communicated or that you meant to communicate by the revisions that were made in Exhibit No. 2?

A I am not sure I am trying to emphasize the negative aspect of contraception as much as I was presenting truthfully what was going to be presented in the classes.

Q Considering that the Center for Life, someone at the Center for Life drafted the original version of this document, why did you feel, when you received it, that it was inaccurate?

A Because I didn't feel that it reflected our discussion.

Q What was the contents of your discussion?

A Basically it was an overview of the modules as they would be presented within a certain period of time and what would be covered in each.

Q With regard to, and specifically looking at these two documents, to the first objective as listed, what was your reason for changing the wording from, in the original, "to present complete information" to the wording "to present factual information"?

MR. MILLET: Could you show her where you are speaking from?

[29] MS. HUNTER: Off the record.

(Discussion off record)

MS. HUNTER: Back on the record.

Could you read the question?

(Question read)

THE WITNESS: That was not a conscious change of wording on my part.

BY MS. HUNTER:

Q You weren't aware that that change was made?

A No, not specifically.

Q You don't recall why that change was made?

A No. I was truthfully not aware that it was until you brought it to my attention.

Q With regard to the second objective, what was your reason for changing the wording from "to present information on both the advantages and the medical hazards" to "to present information on the medical hazards"?

A I didn't change the wording.

Q Mr. Hutson changed the wording?

A I don't know who changed the wording.

Q Someone at the Center for Life changed the wording?

A Yes.

Q Was that change consistent with the discussion that [30] you had with Mr. Hutson?

A Yes.

Q What was your reason for wanting such a change in effect?

A As I mentioned before, to reflect what would actually take place in the classes.

Q What it your goal to have what would take place in the classes be to present information solely or primarily on medical hazards, rather than on both the advantages and the medical hazards?

A Would you repeat that, please?

Q I will withdraw that question.

Was it reflective of your conversation with Mr. Hutson to change the wording so that information as to the advantages of common contraceptive methods would not be presented in the family life education program?

A My discussion with Mr. Hutson was to have the document reflect accurately what would be presented in the classes.

Q And the difference between these two documents is that information as to the advantages is deleted in the second version of the objectives, is that correct?

MR. MILLET: I object. The documents speak for themselves.

[31] BY MS. HUNTER:

Q Well, is that your understanding of the document?

A Would you repeat the question, please?

Q That the phraseology that information as to the advantages of the contraceptive methods is deleted in the second and revised version of it, is that correct?

A That phrase is deleted from the second version, if that is what you are asking.

Q Is that deletion consistent with you conversation with Mr. Hutson?

A Again I don't remember the exact words of the conversation that I had with Mr. Hutson, but it was my intention that he or whoever developed the document for this part of the contract, the subcontract, would reflect what they actually intended to present in the classes.

Q And is it your understanding that by deleting that phrase that the revised document does more accurately reflect what will be presented in the classes?

A Possibly.

Q Did you have any objection to the revision?

A No.

Q With regard to the third objective, which I think is page 41 of each document, is it you understanding that [32] the change in wording from "advisability" to "inadvisibility of contraceptive use" more accurately reflects what would actually be presented in the family life education component?

A Yes.

* * * * *

[45] Did you consult with somebody about the placement of Sister Betty Ann in this position?

A Yes.

Q With whom did you consult?

A The person in our community that is responsible for assigning sisters in works of our type.

Q Who is that person?

A Sister Grace of the Daughters of Charity.

Q Where is she located?

A Now.

Q Where was she located then?

A She is still located at the same place. She is located in Timonium, Maryland.

Q Does she have an official title or position within [46] the order?

A At the time she was the counselor.

Q In consulting with her, did you discuss Sister Betty Ann's qualifications to be Project Director of the Adolescent Family Life Act project?

A Yes.

Q And what were your discussions concerning that?

A I don't recall, but I would think we discussed her prior experience in the field, her prior knowledge of St. Ann's because of having been there before, her administrative ability.

Exhibit 1

Original Grant Application of St. Ann's

* * * * *

Module II—The Facts about Contraception (3 classes, 1 hour each)

Objectives

- To present complete information on the nature and function of the most common contraceptive methods.
- To present information both on the advantages and the medical hazards of common contraceptive methods.
- To discuss the advisability of contraceptive use among adolescents.

Benefits

- Dispell myths about how pregnancy is achieved or avoided.
- Surface and clarify client attitudes toward adolescent contraceptive usage and its effect on adolescent sexual activity.
- Provide information on the safety and efficacy of contraceptive use, especially in the adolescent age group.

Curriculum

Class #1 (one hour)
- Overview of advantages and disadvantages of more common contraceptive methods.

Class #2 (one hour)
- History and development of oval contraceptives.

Class #3 (one hour)
- History, development and current state of the IUD.

Exhibit 2

Saint Ann's Infant and Maternity Home
4901 Eastern Avenue
Hyattsville, Maryland 20782
June 22, 1982

Ms. Marjorie Mecklenburg
Office of Adolescent Pregnancy Programs
Room 725 H
Hubert H. Humphrey Building
200 Independence Avenue, S. W.
Washington, D. C. 20201

Dear Ms. Mecklenburg:

On April 30, 1982 St. Ann's Infant and Maternity Home submitted a grant application to the Office of Adolescent Pregnancy Programs under the title of Adolescent Family Life Demonstration Project #820052. I would like at this time to submit some supplementary material to this application. Enclosed you will find 11 copies of the following:

* * * * *

5. Revision of pages 16, 40-41, 65

* * * * *

Because of a limited time frame the above items were either inadvertently omitted at the time the proposal was originally submitted, or were received after April 30th, as in the case of the letters and Clearinghouse comments. The revisions to pages 16, 40, 41 and 65 better reflect the services we intend to provide and/or give a fuller explanation of points contained in the proposal.

* * * * *

Sincerely,

Sister Elyse
Administrator

Amended Grant Application of St. Ann's

Module II – The Facts about Contraception (3 classes, one hour each)

Objectives

- To present factual information on the nature and function of the most common contraceptive methods.
- To present information on the medical hazards of common contraceptive methods.
- To discuss the inadivisability of contraceptive use among adolescents.

Benefits

- Dispell myths about how pregnancy is achieved or avoided.
- Surface and clarify client attitudes toward adolescent contraceptive usage and its effect on adolescent sexuality.
- Provide information on the safety and efficacy of contraceptive use which will discourage contraceptive usage among adolescent participants.

Curriculum

Class #1 (one hour)
- Overview of more common contraceptive methods.

Class #2 (one hour)
- History and development of oral contraceptives.

Class #3 (one hour)
- History, development and current state of the IUD.

* * * * *

Deposition Excerpts of
Sister Betty Ann McNeil
Assistant Administrator, St. Ann's
Infant and Maternity Home; Project Director
for the AFLA grant to St. Ann's

[Direct Examination by Ms. Hunter:]

[8] Q One thing that I believe is not on your resume is you are a member of a religious order, is that correct?

A That is correct.

Q And which religious order is that?

A I am a Daughter of Charity of St. Vincent de Paul.

Q And when were you consecrated or when did you become a member of that order?

A I entered the community in 1964.

Q When you returned to St. Ann's in June of 1983, how was it that you came to get the position of Project Director for the federal grant?

A I was offered the position.

Q Was there anything like an application process for that position, or how was it that you came to be selected for that position? Can you explain that?

[9] A I really don't know.

Q Were you interviewed for the position?

A Yes.

Q I believe you said that it was difficult for you to answer how much of our time was spent on the federal grant, is that right?

A Yes.

Q Can you give me some estimate? More than 50 percent, more than 75 percent?

A More than 75 percent. I carry one hundred percent responsibility. The workload fluctuates according to the peak period.

Q And are you paid for the time that you spend administering the federal grant.

A I do not receive a salary personally.

Q But compensation is paid to what or whom?

A Compensation for my services is paid to the community.

Q And do you know the basis on which that compensation is paid in terms of proportion of time; that is, do you know for how many hours of work the community is paid for your time as Project Director?

A It is paid according to a fulltime equivalency position.

Q For the record, when you say "the community", what are [10] you referring to?

A Funding for sisters' services is paid in a lump sum to the local community of the Daughters of Charity, as opposed to an individual member.

Q During the time that you have been Project Director of the federal grant, has that Order received compensation for other services rendered by you?

A Yes.

Q And from what source has that compensation been paid?

A From St. Ann's.

Q And that compensation was for your other duties as Assistant Administrator, is that correct; that is, other than your supervision of the federal grants?

A Yes, the supervision of the federal grant is included in my responsibilities as Assistant Administrator.

Q What I am trying to clarify is the order is paid under the federal grant for the time you spend administering the federal grant; correct?

A Yes. That amount is in the form of contributed services, which is a piece of the match.

* * * * *

[16] Q Are there religious symbols visible at St. Ann's—crusifixes and posters, and so forth?

A Yes.

Q Is there a chaplin assigned to St. Ann's, or who officiates at services in the chapel?

A St. Ann's does not have a chaplin per se.

Q Who officiates, then, at services?

A The services are for the sisters and priests are engaged by them for their needs.

Q Do any residents, any of the young women who are residents at St. Ann's, attend any of the services in the chapel?

[17] A If they wish to.

Q How often are services conducted in the chapel?

A For the sisters, they are conducted every day.

Q Are residents free to attend those services?

A Anyone is welcome to come to the chapel at any time for any reason, for any purpose.

Q How many sisters are working at St. Ann's?

A Working at St. Ann's, there are eight.

Q Are there others who reside there or who have some other affiliation?

A Yes.

Q What is that?

A A sister attending school lives with us, some sisters who work elsewhere are residing there temporarily.

Q Are there religious symbols and pictures, and so forth, in the building outside of the chapel?

A Yes.

Q Are there crusifixes or other kinds of religious symbols in the administrative office section or sections of the building?

A There are some.

Q What about the program rooms or space?

A There may be some.

[22] Q Well, what I want to ask you is what is the policy of St. Ann's in terms of providing any informational services as to the usage of contraceptives?

A The information and services on family planning matters if handled through the Center for Life.

Q I am not speaking now, just to clarify, I am not speaking of just as to the federally funded grant, so prior to the federally funded grant, and for any recident or person there, the policy at St. Ann's would be to refer to the Center for Life? Is that accurate?

A That is right.

Q What is your understanding of what the philosophy or policy is of the Center for Life as to contraceptives?

A My understanding is that a range of informational services is provided in an educational context.

Q Is it your understanding that the Center for Life encourages the use of any particular kind of family planning?

[23] A My understanding is that they teach all methods of family planning in the context of health and medical perspectives, in the context of a woman's health.

Q Is it the position of the Roman Catholic Church, as you understand it, that methods of preventing pregnancy, other than abstinence or natural family planning, are not acceptable under the belief structure of the church?

A Right. Yes.

Q And does your policy of referring persons, as to contraceptive matters, to the Center for Life, is that consistent with your understanding of the Roman Catholic Church's position on family planning?

A Yes.

Q And why is that consistent?

A Because through their educational approach they enable the young woman to come to an understanding of what is best for her health and her body in order to make decisions regarding responsible sexuality.

Q Is it your belief that the teaching of consistency with one's health leads to the decision to use abstinence or natural family planning as a means of controlling pregnancy?

A Yes.

Q Is it your understanding that that is the position of [24] the Center for Life?

A Yes.

Q Just for the record, the Center for Life is affiliated with what organization?

A Providence Hospital.

Q And that is located in Washington, D.C.?

A Yes.

Q There are, I believe, a number of non-clergy employees at St. Ann's, is that right?

A Oh, yes.

Q And how are those persons who are lay employees of St. Ann's informed or counseled of the religious values or policies of St. Ann's?

A Could you restate your question?

Q How do you communicate to the lay employees, through what method, the philosophy or the beliefs or the policies of St. Ann's as an institution?

A Through ongoing supervision in administrative channels.

Q Are there any written statements of that policy?

A St. Ann's has a written philosophy.

Q And in what form is that?

A I don't understand.

Q Is it a pamphlet or book?

[25] A It is on a piece of paper. It is also printed in the Personnel Handbook. At the time that any employee is interviewed for a job, they have the opportunity to evaluate St. Ann's philosophy and decide if it is something they feel comfortable working with and they have a choice to work there or not to work there.

MS. HUNTER: Would you mark this as McNeil Exhibit No. 2?

(The document referred to was marked McNeil Exhibit No. 2 for identification)

BY MS. HUNTER:

Q Sister Betty Ann, I am showing you what has been marked as McNeil Exhibit 2. Do you recognize that?

A Yes.

Q What is that?

A This is the front cover of the Employee Handbook.

Q And I believe there is a second page. Is that the statement of philosophy that you just described?

A Yes.

Q And is that an accurate statement, a current accurate statement of the philosophy of St. Ann's?

A To the best of my knowledge.

* * * * *

[34] Q There are a number of subcontractors on the St. Ann's grant, is that correct?

A Yes.

Q Who are those subcontractors?

A The Center for Life, Providence Hospital, Catholic Charities of Washington, the National Center for Family Studies.

Q That is at Catholic University?

A Yes.

Q What was the relationship, as you understand it, between Providence Hospital and St. Ann's prior to the time of this grant? Can you just describe what that has been?

A Can there been a working relationship between the two organizations?

A Yes.

[35] Q What has that been?

A Providence has always been the prime provider of obstetrical and medical services for us.

Q Providence is a Roman Catholic Hospital, is that correct?

A Yes.

Q What about their relationship with Catholic Charities of Washington? Has there been, historically, a relationship with that organization?

A Yes.

Q And what has that relationship been?

A Catholic Charities has always been a provider of social services, basic human services, as well as a referral source and referral to and has provided adoption services upon request.

Q What is the function of Catholic Charities as a subcontractor under this specific grant?

A They provide the Outreach services.

Q Can you briefly describe what they are doing under the federal grant in terms of Outreach?

A They are providing services, primarily counseling services.

Q Are there specific locations where they are provided?

[36] A The nature of their work and the breadth of the area requires them to be very mobile in terms of where they actually provide the services and they go to a number of different sites.

Q Is the Southeast Pregnancy Crisis Center affiliated in any way with Catholic Charities?

A Yes, it is.

Q Is that one of the sites where they do counseling services?

A They may.

Q What about the Pregnancy Aid Center? Are you familiar with that?

A Yes.

Q Is that affiliated in any way with Catholic Charities?

A No, not with Catholic Charities.

Q Are there any services under this federal grant that are being done through or at Pregnancy Aid Center?

A Both of those crisis centers are referral sources and have the availability of the consultation of the community based workers, the Outreach workers. Services may be provided there, but generally, to the best of my understanding, are not.

Q So those two organizations are referral sources, but so far as you know, they are not generally locations where [37] counseling is done, is that correct?

A Not ordinarily by our workers.

Q Is the Pregnancy Aid Center affiliated with any organization or any religious groups, so far as you know?

A To my knowledge, it is not.

Q Where is that located?

A It is located in Prince Georges County, the area near the University of Maryland.

Q What about Catholic University? Historically, has there been a working relationship between St. Ann's and the National Center for Family Studies at Catholic University or other components of the University?

A To my knowledge, I would say there has always been a potential for collaboration, but a working relationship of the nature that we have with Providence Hospital and Catholic Charities, to the best of my knowledge, it has not previously existed. I would add that my understanding is that the National Center for Family studies is a fairly new organization less than ten years old, possibly less than five.

Q The time that you made your renewal application for funding in 1983, how much funding did you initially request from OAP, do you recall?

A Request from?

[38] Q Yes.

A If my memory serves me correctly, it is in the two hundred thousand ball park.

Q Do you recall that the amount that you eventually received was in excess of the amount that you originally requested?

A Yes.

Q Approximately how much was the difference, do you remember?

A If I recall correctly, on paper the figure appears to be $35,000.00, if I recall correctly.

Q What is your understanding about why you received the additional $35,000.00?

A It was very confusing to me.

Q Do you have an understanding about why you got the additional money?

A It is not clear. In the prior years, we did not receive the full dollar amount and my assumption was that it was—

MR. NELSON: Don't assume, Sister. If you know the answer, state it.

THE WITNESS: I am really not entirely sure.

* * * * *

[49] I believe there is or I believe you referred to a school on the premises or some kind of educational program; is that correct?

A Yes.

[50] Q How many teachers are employed to teach in that facility?

A To the best of my knowledge, it is about five.

Q Did that facility exist prior to the federal program?

A Yes.

Q Are any of those teachers paid, in whole or in part, by any funds under the federal program?

A Some of those positions are new positions or expanded positions and, therefore, do fall within the parameters of the grant.

Q How many teachers are paid, in whole or in part, by the federal funds?

A To the best of my knowledge, at least one full-time and two part-time equivalents.

Q Are paid under the federal program, is that right?

A Yes.

Q Why were there additional teachers hired with the federal funds?

A Because of the increased volume of students, the addition of the day program, and the program enrichment.

Q Do you know how many students are currently participating in the educational program?

A I don't know.

[51] Q You have mentioned several times the day program. Do you know how many participants there are now in the day program?

A At this moment, to the best of my knowledge, there are four involved.

Q In the day program?

A Yes.

Q What is the capacity of the day program?

A Ten. Ten, and the potential for up to twenty.

Q to go back to the educational program for a moment, can you give me some sense of how many persons there are participating in the educational program? Fewer then ten, fewer than twenty?

A The educational program serves the maternity residents the capacity is twenty-five—the aftercare residents—the capacity is eight—and day students.

Q And do you have a sense of approximately how many persons are actually participating in the educational program?

A I would have to guess.

MR. NELSON: Don't guess.

BY MS. HUNTER:

Q Can you give me an approximate number? Between five and ten, between ten and twenty?

[52] A At this moment, between fifteen and twenty. It is a low figure.

Q How many full-time teachers are employed in the educational program?

A At least four.

Q And in addition to that, there are some part-time teachers?

A At least five are full-time.

Q And, in addition, are there some part-time teachers?

A Yes.

Q Do you know how many, approximately, are part-time?

A At least two.

Q Are all of these teachers lay persons or are any of them clergy?

A Only one is a sister.

Q Is there any religious component to what is taught in the educational program?

A Religion is not a part of the curriculum.

Q The one teacher who is a sisterm what does she teach?

A Social studies, history—to my understanding—and individualized instruction with GED students, remedial work.

* * * * *

[53] Q Is there family therapy or family counseling that takes place as part of the federally funded program at St. Ann's?

A Yes, family services.

Q Can you briefly describe how that operates?

A I am not sure I understand what you are asking.

Q Can you tell me who does the family counseling or family therapy?

A The Outreach workers provide family counseling services.

Q Is there a family counseling that is done on site at St. Ann's?

A It may be.

Q Is family counseling part of what is provided to the [54] residents at St. Ann's?

A It may be.

Q Is it optional for them to participate, or why is it possible?

A The ability to provide family counseling presumes that there are family members available, accessible, and willing to be involved. Not all clients come to us from a family context or with active family involvement.

Q Does the program have some contact with the families of all of the participants or are there some participants for whom there is no family contact?

A We try to involve some family members of every client, whenever possible. "Family member" may mean a non-blood relative who is in a caretaker role, or substitute mother figure.

Q In your capacity as Project Director, are you aware, generally, of the nature of the counseling or family therapy that is done as part of the federal program?

A I don't understand what you mean by "nature".

Q I mean by that the general objectives or goals of the counseling or the process by which it is done.

A I am aware of the process. Because of the diversity of our population, I am not familiar with every individual [55] case.

Q Is it your understanding that adoption is discussed in family counseling sessions?

A It is my understanding that adoption is discussed in counseling with the young woman. Whether or not that is in a family context, I don't know.

Q What is your understanding of what values or philosophy concerning adoption is reflected in the counseling sessions with either the young woman alone or with her and her family?

A Could you rephrase that? I don't understand.

Q Can you tell me what you don't understand about the question?

A Values about adoption.

Q Does St. Ann's encourage advocacy of adoption as an alternative for pregnant young women?

A St. Ann's advocates informed decisionmaking regarding pregnancy for a young woman. We believe it is important that she have the opportunity and the assistance, the professional assistance, to look at her situation and the feasibility of keeping her baby and raising it

as a single parent, or formulating an adoption plan. We do not push options over another for an individual. That must be her decision.

[56] Q Is it your understanding of the statute under which this federal grant program was created that one of the purposes of the statute is to encourage adoption as an alternative?

MR. MILLET: I object to your asking the witness for a legal opinion.

She may answer the question.

MS. HUNTER: I am just asking her understanding.

MR. MILLET: I understand. I am just noting my objection.

MS. HUNTER: Would you read the question?

(Question read)

THE WITNESS: MY understanding of the statute is that the promotion of the option of adoption be provided. In recent years, in my opinion, social workers have not adequately discussed the issue. Our goal is to raise the issue so the young woman can have the opportunity to evaluate that option for herself, rather than for us to advocate a position for her.

BY MS. HUNTER:

Q In what way does the St. Ann's program reflect the goal of promoting the option of adoption?

A At the present time, within the counseling group context, young women do return, who have been with us previously [57] and made adoption plans, and share their experience. Social workers from agencies who provide adoption services come and explain what adoption is, because most people generally are not familiar with what it is, and the procedures. We are looking at the present time for simple handouts that are prepared regarding adoption, and I know of one that is distributed.

We also have provided staff development sessions or a staff development session for Pathway staff to familiarize staff with what adoption is at the present time.

Q In what way is the option of retaining one's child promoted in the St. Ann's program?

A My understanding is that, again in the group counseling context, young women who have kept their child, who have been with us or who are known to other social workers on the outside, do return and share what their experience has been as a single parent, what some of the opportunities have been, and what some of the obstacles have been. In the counseling context, and in the educational process, realities of living independently and raising a child or being a school-age parent and raising a child are explored. For example, budgeting, obligations, parenting skills. We try to provide an overview of both options and we do have handouts that are provided to the girls about infant care and child development that would be useful after they would leave.

[58] Q Do you keep statistical information as to how many of the girls who participate in the program choose either the option of keeping their child or adoption?

A That information is gathered at St. Ann's, yes.

Q Is the goal of an increased number of young women who choose the adoption alternative one of the goals, as you understand it, of the St. Ann's program?

A I am sorry, I lost the question. Would you repeat it?

(Question read)

THE WITNESS: I would say that our goal is to enable each client to make the best decision for herself in her situation.

* * * * *

[76] Q What are the Outreach social workers instructed to do in the event that an adolescent inquires about abortion or the availability of abortion services?

A They would follow the policy of their agency.

Q And their agency is what agency?

A Catholic Charities.

Q And what is your understanding of that policy?

A My understanding of that policy is that the young women would be enabled to evaluate her situation to make her decision.

Q Is your understanding of Catholic Charities that its policy on abortion is consistent with the policies of the Roman Catholic Church on abortion?

A Yes.

Q Have you ever discussed the appropriate response of persons working under this Federal grant to an inquiry concerning abortion with anyone from the Department of Health and Human Services?

A No.

Q Have you ever attended any conference or meeting at which that topic came up, that is, how someone working under this grant should respond to an inquiry concerning availability or advisability of abortion?

[77] A No.

Q I believe it is correct to say from your previous testimony that if a young women asks an employee of St. Ann's about the availability of abortion services that she is referred to another agency, is that correct, to another institution for information?

A We don't provide information on abortion.

Q Is it also correct that it is the policy of St. Ann's that she would not be referred to any agency which itself provides abortions?

A Yes.

Deposition Excerpts of
Robert A. Hutson,
Director, Center for Life, Providence Hospital

[Direct Examination by Ms. Hunter:]

[15] BY MS. HUNTER:

Q Mr. Hutson, take a look at what has been marked as Hutson Exhibit 1. Do you recognize that?

A I haven't seen it for awhile, but I recognize it.

Q Can you state for the record what it is?

A The title is "Statement of Philosophy"—"Policy Name, Statement of Philosophy—Department, Board of Trustees, Providence Hospital."

Q Does this Statement of Philosophy accurately reflect the hospital policy, as you understand it, at Providence [16] Hospital on the issue of abortion?

A Well, that is the statement of philosophy for the hospital, and so I would have to read it to really respond specifically to that question.

Q Please do. Take the time and read it.

A Yes, I would say it does.

Q Is there any similar statement of policy from the Center for Life?

A No.

Q The Center for Life is a part of Providence Hospital, is that correct?

A Yes, with the understanding of the corporate structure that I explained before.

Q But there is no different statement that the Center for Life has generated? That is what I am trying to clarify.

A That would be correct, there is no different statement.

Q How is this policy, the hospital policy on abortion reflected, to the extent that it is reflected, in the activities of the Center for Life?

A I suppose the main programmatic reflection would be our reduced fee maternity program and as to how that

program functions. The intention of that program is to provide pre-[17]natal and delivery care for women who are termed self-responsible patients; that is, they don't have the benefit of medical insurance and are not eligible for medical assistance, Medicaid or, I suppose, Medicare could enter into it, and as a result of paying out-of-pocket for whatever medical care they would need for themselves and their baby, we provide a reduced fee program for them in order to help them with that particular—well, in most cases—problem that they have in dealing with the pregnancy at hand.

Q Do any of the activities of the Center for Life include counseling on pregnancies?

A Not as a general rule. The people that come to the reduced fee program, by and large, have made, if there was any decision to be made about abortion, have made that decision already and they come to us for financial help and medical care.

Q Does the Center for Life have a policy referral for abortions?

A Yes.

Q What is that policy?

A We do not refer.

Q Is that the same policy as the hospital, to your knowledge?

[18] A Yes.

Q Does the hospital accept Medicaid eligible patients?

A Yes.

Q Do you in the Center for Life come into contact with any Medicaid eligible patients?

A To a limited degree. If someone is a Medicaid eligible patient, they are not eligible for the Center for Life reduced fee package. They don't need it. And so they are referred automatically to people in the OB-GYN Center where the medical care for Center for Life, as well as Medicaid and other patients have been delivered and they

are brought into the medical service system directly, rather than through Center for Life.

Q Do you know whether the hospital does, apart from the Center for Life, does pregnancy counseling?

A Not to my knowledge.

Q How, other than to the extent that you know, other than the Center for Life activity, how is the hospital policy on abortion reflected in the services of the hospital?

A Other than the Center for Life?

Q Yes.

A Well, it is reflected in this policy that guides the medical operations of the hospital. In other words, abortions [19] are not permitted within the hospital.

Q What is the policy of Providence Hospital on contraception, to your knowledge?

A Well, again, the policy that we have here states the general policy. I can't place my eyes on it quickly, but I know I read it, or I think I did anyway. Maybe I didn't. In any case, the hospital, it does not prescribe contraceptives. Now, the exact definition of the policy is something that is a matter for the medical administration, and that is not part of my sphere of operations.

Q Is it your understanding of the policy that Providence Hospital does not furnish any chemical or medical means of contraception to its patients?

A That would be correct.

Q How is that policy reflected in the programs of the Center for Life?

A Well, we follow the same guidelines in that we do not, as one of our services, provide contraceptive methods or devices.

Q The Center for Life provides, however, a program of natural family planning, is that correct?

A That is correct.

Q And would it be accurate to say that natural family [20] planning is the sole means of fertility control which is

accepted by the Roman Catholic Church?

A No.

Q How would that be incorrect?

A Well, I am being technical. You could say that abstinence is also a means of fertility control and that, certainly, as I understand the teachings of the church that I belong to, that would be acceptable.

Q So those would be the only two methods, so far as you know; is that right?

A The only two, yes. In the case of natural family planning, it is a group of methods.

* * * * *

[30] Q Is the Rainbow program a different name for the adolescent fertility awareness program?

A Yes.

Q In other words, basically the same program was given a new name, is that correct?

A Yes, and copyrighted in the early part of '83.

Q Is the program that is being done at S. Ann's the only program that the Center for Life is doing which is funded by Title XX or the Adolescent Family Life Act?

A It is the only one.

Q And that program has not been presented anywhere except St. Ann's, is that correct?

A That is correct.

MS. HUNTER: Could we have this marked as Exhibit 2 and this as Exhibit 3?

(The documents referred to were marked Hutson Exhibits Nos. 2 and 3 for identification)

BY MS. HUNTER:

Q I am going to ask you to look Mr. Hutson, at both [31] Exhibits 2 and 3 and I direct your attention to the pages in each one that have 40 and 41 at the bottom. With regard to Hutson Exhibit No. 2, can you tell me what this is?

A It is a description of our part of the grant proposal that was submitted to HHS.

Q Did you write or participate in writing this part of the grant proposal?

A I did.

Q Directing your attention, as I said, to the bottom of page 40 and top of page 41, which is labeled "Module II The Facts about Contraception", and the first three objectives listed are, one, "to present complete information on the nature and function of the most common contraceptive methods" next, "to present information both on the advantages and the medical hazards of common contraceptive methods", and then next, "to discuss the advisability of contraceptive use among adolescents". Is that language the language of the grant proposal as you originally wrote it, to the best of your recollection?

A Yes.

Q Directing your attention now to Hutson Exhibit 3, can you tell me, briefly, what that exhibit is?

A It is a letter or there is a cover letter on it from [32] Sister Elyse to Marjorie Mecklenburg, indicating that she is sending a number of additions or supplementary material for the application, as was provided for in the application process, and she lists a number of items here. Some of that material is attached to it.

Q Let me direct your attention specifically again to the pages attached to Exhibit 3, which are labeled 40 and 41, and again to Module II – The Facts about Contraception, the objectives, which are now described in this exhibit as being, first, "To present factual information on the nature and function of the most common contraceptive methods, to present information on the medical hazards of common contraceptive methods, to discuss the inadvisability of contraceptive use among adolescents". Can you tell me the reasons why the objectives were changed?

A Well, essentially because we felt, when we put this grant together, as happens often when you are putting grants together, grant proposals – this one, as you probably know, is about that thick – (indicating) – there was a lot of work that had to be done very quickly and as we reviewed it, and there are a number of things on here that were added, there was a decision made that we should modify some elements of the grant proposal as we did.

[33] Q Who made the decision to modify those elements?

A Those particular ones, I did.

Q And why did you make that decision?

A Because we felt that the modifications that we made would more accurately reflect the work that we would be providing.

Q When you say "we", who are you referring to?

A Chris O'Keeffe, I think, and Ann Lanctot was mentioned in the material that I provided under the subpoena as another teacher, so Chris and I were the only ones involved at that point, but we knew there would be other teachers involved in the process.

Q Did Sister Elyse have any problems with the language that I have specifically referred to as it was originally written in Exhibit No. 2?

A Yes, I remember that she had questions about it.

Q What were her responses to that?

A Well, she felt that the way we were presenting it was going to – she wanted to make sure that we were accurately reflecting the material that we would be dealing with, and that was her concern.

Q At the time that you wrote the revision, did you feel that the emphasis on the hazards of contraceptive methods and [34] the inadvisability of contraceptive use, to use the language from your revision, more accurately reflected the contents of the program than did the original language?

A Yes.

Q So your testimony is that the language in Exhibit 3 more accurately reflects what you understand to be the program of the Center for Life?

A Yes, that would be correct.

Q Why did you feel it was appropriate to emphasize the hazards of contraceptives and the inadvisability of contraceptive use?

A Well, we knew that the method of family planning that would be provided, that would be offered through our section of the program, would be natural family planning and just by the rules, so to speak, of NFP, and I should make it a point that I am not talking about any moral rules—I am talking about just the way that one must abstain or observe signs, symptoms, in order to properly use the method, whether it is to achieve or avoid pregnancy, are inconsistent with contraceptive use.

If you are using—I don't want to go too far into this because I am not a teacher and I don't have the expert ability that someone like Chris does, but, for example, if you [35] were using a contraceptive foam during the fertile phase of the cycle, even if you were using natural family planning and decided to use the foam to avoid or protect against conception during the fertile time, you could end up obscuring the observation of mucus to an extent that you might actually have a much better chance of getting pregnant, because you wouldn't be able to read your signs properly, so I think that was in our mind at the time, that if you were going to offer natural family planning and at the same time talk up contraceptive use, encourage contraceptive use, this really wasn't consistent, from a practical point of view, and our objectives were to help the participants to avoid future unintended pregnancies.

Q I take it, also, that one of your objectives was to encourage the use of natural family planning, is that correct?

A Well, it is the method that we provided in our part of the program, yes.

Q And, to the extent that any other method of contraceptives would interfere or be counterproductive with the usage of that method, then those counterproductive methods would be discouraged; is that correct?

A I wouldn't say "discouraged." I think that a better way or the way I would put it is that you couldn't encourage both at the same time. It just, as I say, isn't smart. It is [36] not going to achieve the end for which the person is learning natural family planning, unless the person is trying to achieve pregnancy, and in this population the presumption was that the girls were not trying to achieve another pregnancy.

Many people come to NFP to use it as a—I was going to say "alternative" but I don't mean that—as an aid to conception, people who are experiencing infertility problems, so some people come to our NFP program for that reason.

Q But it would be fair to say, would it not, that the point of view that was to be expressed in this program was to encourage the usage of natural family planning, rather than to encourage the usage of any other kind of family planning?

A I would say that is correct, yes.

Q Is it your understanding that all methods of natural family planning are inconsistent with usage of barrier methods of contraceptives?

A That all methods of natural family planning are inconsistent with barrier methods?

Q Let me preface that by saying it is my understanding from your testimony that natural family planning encompasses a variety of methods of natural family planning. My question is are all of those methods inconsistent with the usage of barrier contraceptives?

[37] A I am thinking through that. I guess the only exception I could think of, and again I am not an expert in this area, but the only exception I could think of would be the use of a condom, which probably would not interfere

with mucus observation, although there is the potential for that. Condoms are, from the little I know about them, that method is not always terribly reliable, and I think that even there there could be a problem.

Q With regard to the basal body temperature method, would the usage of barrier contraceptives be inconsistent, so far as you understand it?

A No, so far as I understand it, although we teach all the methods. I think the concentration in our program is around what we call Sympto-Thermal Method, which is the combination of Billings ovulation, which is mucus observation, and temperature method, which is using the chart to correlate the two, because it gives someone a stronger, we believe, a stronger program, stronger method. We teach all of the observations so that a person can choose, but most people, if not all, go away and basically use sympto-thermal, which involves mucus observation.

Q So it is true with regard to the particular natural family method that is encouraged by the Center for Life that [38] the usage of condoms would be inconsistent, is that true?

A That would be true.

* * * * *

[42] Q And then directing your attention to Exhibit No. 4, which is the progress report that you signed, and then 8, which is labeled philosophical base which shaped our model for service delivery, is that answer under 8 there, which goes from page 2 to 3, a response to the guideline I just read?

A Yes.

Q And did you write that section of the progress report that is under number 8?

A I don't remember specifically writing it, but I would take ownership for it, for the program, yes, and it is very likely that I did write it.

Q If you would, take a minute to read that particular answer to that particular inquiry, I guess one could say, then tell me if that is, so far as you understand it, a correct statement of description of the program?

A Okay.

Q Can you answer the question or do you want her to read the question back?

A Yes.

(Question read)

BY MS. HUNTER:

Q My question is is that, so far as you understand it, a correct description of the program or the philosphy of the [43] program?

A Yes, I would say so.

Q And you would say that it was correct as of June 15, 1983, is that true?

A Yes.

Q Would you say that is correct as of today?

A Yes, by and large.

Q Is there any way in which it is incorrect as of today?

A Without a great deal of study, no, I don't know that there is anything that I see in there that I would say is not something we would agree to now.

Q Now, directing your attention to the bottom of page 3 of the progress report that you wrote, or wrote part of, or that you signed, No. 10, "Additional Comments", it states: "How is the work that we are doing in this project different because we believe in Jesus Christ?" That was, I believe, a response based on your previous testimony to something which simply says "Additional Comments on the inquiries from Sister Betty Ann", is that correct?

A That is correct.

Q Can you explain why you made that additional comment and what it means?

[44] A Well, at the time Sister Betty Ann was coming into her position – I don't recall the date – this was a part of our initial orientation, I suppose. She had asked for an

update on where are we in our side of the program, and, you know, the answers to the other questions reflect that. There was a great deal of concern on our part, that is, Center for Life, that the program did not have the caring attitude that we thought it should, that there was too much emphasis on program and on procedure and structure.

You know, there were other more specific things that had been observed in the St. Ann's environment, whether it was comments by students or teachers or whatever, not that there was a hateful environment, but there seemed to be too much emphasis on "program" and not enough emphasis on "person" in just a basic caring way, and so that comment was meant to strike a responsive cord in Sister Elyse, who I knew as a christian, to say to her, look, we happen to have, outside of our work in this project, we happen to have a common understanding of this person, Jesus Christ, who was a caring person and we should be doing a better job, and this was what was in my mind, that we should be doing a better job in caring for the girls as people than we are doing at the present time, because we have an excellent model.

Exhibit 1

PROVIDENCE HOSPITAL
STATEMENT OF PHILOSOPHY
BOARD OF TRUSTEES
December 22, 1973

Policy

A. Providence Hospital conducted under Catholic auspices through the sponsorship of the Daughters of Charity of St. Vincent de Paul of the Emmitsburg (Maryland) Province, also known as the Sisters of Charity of St. Joseph's, professes a philosophy of Christ-centered health care based upon the teachings of the Gospel.

B. The primary reason for the existence of Providence Hospital since its incorporation in 1864 is the care of the patient. In its actions Providence Hospital conforms to the law of the United States and of the District of Columbia as and when applicable, and consistent always with its rights, privileges and authorities confirmed to it by its charter and by the laws of the United States and of the District of Columbia, and consistent with its responsibility for prudent management and direction of its affairs and with its moral and ethical standards. *To this end, Providence Hospital recognizes that its facilities and services shall be made available to its patients without regard to age, race, color, sex, religion or national origin and will also make such facilities and services as barrier-free as possible for the purpose of assisting the handicapped.*

C. The moral and ethical philosophy expressed in this Statement of Philosophy arises from the religious beliefs and convictions of the Daughters of Charity of St. Vincent de Paul, which have been given corporate and institutional expression in the operation of Providence Hospital from the time of its original incorporation to the present. As a Catholic institution, Providence Hospital requires that all persons associated with it in any way in its health care programs regulate their conduct so as to be in conformity with

the moral and ethical philosophy of the Hospital which is: all men are dignified in that each is a unique creation of God and must be esteemed as individuals of worth, entitled to respect, and inherently vested with a right to life. This inherent right to life exists at every stage of being from the moment of conception, and this same inherent right to life compels recognition that no person has the right to injure or to terminate human life or to attempt to duplicate it by artificial means. Accordingly, any act which, by chemical or mechanical or surgical means, has the primary intended result of terminating a fetal or embryonic pregnancy or causing a miscarriage is prohibited. Likewise, any act which, by chemical or mechanical or surgical means whose sole immediate effect is the termination of life for any reason, is prohibited.

D. In order to insure that its responsibility for patient care is fulfilled, Providence Hospital will seek to exact from all persons associated with it in providing health care an accountability for their performance and for their conformance with the professional and institutional standards and with the ethical and moral principles applicable at Providence Hospital, as defined and promulgated by the Board of Trustees from time to time.

E. Inherent in the task of rendering care to its patients, Providence Hospital recognizes the need to provide for the spiritual as well as for the physical well-being of its patients. Furthermore, Providence Hospital acknowledges its desire, in accordance with its objectives, resources and facilities, of participating in the education of all persons associated with it in the care of patients, and of promoting an atmosphere conducive to the development of new techniques in the delivery of patient care and of encouraging and cooperating in responsible research.

F. Because of its adherence to principles of Christian social justice Providence Hosptial affirms that all persons associated with it in its endeavors shall receive recognition

of their personal dignity and worth and, in accordance with their individual development and receipt of appropriate material compensation.

G. Providence Hospital recognizes its position as one of many health care facilities and its responsibility for active participation in responsible planning for the provision of health care services and will, therefore, cooperate as appropriate and in accordance with its philosophy with other institutions and agencies in identifying and striving to meet health needs in a proper, efficient and an effective way.

Deposition Excerpts of
Mary Christine O'Keefe,
Coordinator of National Family Planning and
Adolescent Fertility Awareness at the Center
for Life, Providence Hospital

[Direct Examination by Ms. Hunter:]

[24] Q Under "Supplies", various amounts are listed for printing costs. Can you tell me what those supplies are? When you say fertility awareness module or contraception module, what does that mean?

A We had a number of handouts that we were making available for the girls at St. Ann's. There are some books, some articles, just those kind of things, just articles and books that were handouts, also some poster boards and supplies like that for them to do projects on.

Q What were the names of the handouts, the materials?

A Let's see. The fertility awareness module included the Rainbow booklet that is a part of the Rainbow program, a handout developed by the Department of Health and Human Services called "Eight Popular Reasons for Having Intercourse", a brochure called "Knowing is Caring and Caring is Sharing", [25] an article from Red Book magazine called "The IUD Story of Pain and Risk". In one class we gave a handout listing various contraceptive methods, their effectiveness and possible side effects. That was only given out in one class. And then books were provided that the girls could either take or not take, depending on their interests, called "Fertility Awareness", "The First Nine Months of Life", "Sex, Love and the Believing Girl", and once by mistake we took "Sex, Love and the Believing Boy". They seemed to like that one better. "The Good News About Sex", "Through Sex to Love", "Birth Control-Why are They Lying to Women". There may be one more. That is all of them I can think of right now, but it is the list, whatever list we submitted to you.

Q Does the list that you just stated for the record, does that include for the other modules, too?

A Oh, no. The Natural Family Planning Module also would include the Natural Family Planning kit of handouts and a basic body thermometer and the book, "The Cooperative Method of Birth Control".

Q Were you involved, Ms. O'Keeffe, in the preparation of the grant proposal that was submitted by St. Ann's that included the family life education component?

A Yes.

[26] Q Did you write that section of the grant proposal?

A I wrote part of that section, I believe. I think I wrote something and submitted it to my boss and he made changes and gave it back to me, and I made changes and he made changes and then it was submitted to Catholic University, I think, the Office of Family Services, or something like that, and they put together, helped put together the final package and I think there may have been some changes made at that point. So I had a hand in it, but did not actually write the section myself.

Q When you say your boss, to whom do you refer?

A Robert Hutson.

Q And he is the Director of the Center for Life?

A Yes.

Q Can you recall who, specifically, at Catholic University was involved with preparing the grant proposal?

A I think, among others, it was Steve Priester.

Q What was his role, exactly, in preparing the proposal?

A I don't know.

Q What was the nature of the changes that were made in the grant proposal, the section that you dealt with?

A I really don't recall. I think it was probably just a matter of phrasing or emphasis.

[27] Q What was the grant proposal? What sources was it based on?

A What do you mean?

Q The section of the grant proposal that you were involved in writing dealt with what was called the family life education component of the grant, is that right?

A Yes.

Q And that essentially involved presenting an adolescent program similar to the one that you had developed already at the Center for Life, is that correct?

A Well, no. Actually the fertility awareness section of the family life education component was similar to what we had developed and the natural family planning section was similar, but the parental component and the intimacy modules were very different. We had never done anything like that before.

Q So it would be fair to say then that you based two sections of the St. Ann's program on your previous materials; that is, the fertility awareness section and the natural family planning section, is that correct?

A That is correct.

Q And on what do you base the other parts of the St. Ann's program?

[28] A The intimacy section, I really can't remember any sources. I remember just trying to think in terms of the family life education, what did we want the girls at St. Ann's to be able to come away with, and we knew that we wanted them to come to a fuller understanding of intimacy and we began with development of self-concept and then friendship and then heterosexual relationships and marriage, and that it was a whole development of intimacy, but I really don't recall basing it on anything. It was more the needs that may have been expressed by St. Ann's, or maybe just a notion that we had of what family life education should involve. I assume that we probably looked at the grant, the regulations. I remember looking at

the regulations and deciding that, you know, we had to include certain things, but it has been so long since I have read the regulations, I really don't know what we based that section on.

Q Did you, yourself, have contact with anyone at St. Ann's during the preparation of the grant proposal?

A I know we got a request from St. Ann's to develop the proposal and submit it to them.

Q Do you know who that came through?

A I think it was from Sister Elyse to Bob Hutson to me.

[29] Q Did you have any contact with Sister Elyse yourself?

A I think I spoke to her on the phone after the proposal was developed, but I really don't recall. I don't recall having an especially close relationship with them. I know it was done very hurriedly. We had a very short amount of time that we had to develop the proposal, and so I think it was just a matter of sitting down and doing it, you know, and submitting it. I think there was very little contact.

Q Did the idea of including the Center for Life component come from, so far as you know, from Mr. Hutson or from someone at St. Ann's?

A I think it came from someone at St. Ann's, but I am not sure. I know it came to me through Mr. Hutson.

Q Did you become aware that there were revisions submitted to HHS of the grant proposal after the first version of the grant proposal was submitted?

A Oh, yes. That was at the request of Sister Elyse.

Q And do you recall part of the revisions were to change the description of the Module II as it was listed in the grant proposal, the facts about contraception?

A Yes.

Q And what is your understanding of why those revisions were made?

[30] A It seems to me that Sister Elyse was displeased with the language of the original proposal.

Q Do you recall what the language of the original proposal was, in effect?

A No.

Q Do you recall that the language of the original proposal was, essentially, to present information concerning contraceptives to the participants in the program?

A Yes, and I know that our intent never changed. We had intended to present the course the same way in the original submission as in the revised submission, but she was displeased with the wording in the original submission, and the intent and what we planned to include in the contraceptive unit never changed. We did the same thing that we had always intended to do.

Q Was her displeasure, to your knowledge, because the original submission alluded to a presentation of information that may have included advantages, as well as disadvantages, of methods of contraception?

A That may have been it. I know that the tone she probably – Well, I can't speak for her. I don't really know, you know, what she would have felt or thought, but she was displeased.

* * * * *

[35] Q What section do you teach?

A I teach at St. Ann's the contraceptives section.

Q Who teaches the fertility awareness?

A Mrs. Lanctot.

Q And what about the natural family planning?

A Sue O'Brien.

Q Can you tell me this: In comparing this outline of successions with the previous document No. 3, which was the description of the program as it was in the grant proposal, with, I believe, different modules and so forth, in terms of number of classes and so forth, there appear to be

differences between how it was outlined in the grant proposal and this document No. 4.

A Yes.

Q Can you explain those differences?

[36] A The differences came about very early in the program. At the very beginning when we, as we thought it through after the proposal was submitted, we realize that it would make a lot more sense to do the intimacy section prior to the contraception section, just in the natural flow of the course, and that we needed to spend more time on intimacy because the girls seemed to be having difficulty in understanding relationships and we wanted to spend more time with them on self-esteem building activities.

Q Now, the teenagers that you are talking about in terms of the St. Ann's program, these are pregnant teenagers, is that correct?

A That is correct.

Q Is the primary difference the change in the contraceptive module, that is, that it was moved to later in the course and was, apparently, shortened from three sessions to one session?

A It was actually shortened from three sessions to two sessions and then later on those two sessions were combined into one, and the intimacy section was increased from three sessions to four sessions, and the order was switched.

Q Why was the contraception section shortened so much?

A Mainly because we found that we could cover the [37] material in a shorter amount of time than we had expected to.

Q And the material that you cover is contained on the one page outline, or is outlined on the one page that is listed in here under contraception; is that correct?

A Yes. In the course of the time that we have been involved with the St. Ann's grant, the natural family planning section has been revamped in our hospital natural planning section and improved, and so we made those same improvements for the St. Ann's classes. It is a series of four classes, rather than three.

Q With regard, again, to the contraception section, you say in the first paragraph that it is sometimes two sessions?

A Yes.

Q Can you tell me why it is sometimes one session and sometimes two sessions?

A It depends mainly on the number of questions that the girls have and the personality of each individual group, mainly. Some of the girls were more or less open to the contraceptive information and more or less willing to listen, more or less willing to participate and to ask questions.

Q You prepared this outline yourself, is that right, for the contraceptive section?

[38] Q And it is based, the outline is based on what?

A What I actually teach in the sessions.

Q Do you have any medical training, Ms. O'Keefe?

A No. I have a degree in biology and my natural family planning training, and that's all.

Q And on what do you base the information that you teach in the contraception session?

A Much of it was gleaned from the book "Women in Crisis and Sex Hormones", by Barbara and Gideon Seaman, M.D. A good bit of it was gleaned over the years from information that I picked up at conferences and information that comes into the office on various methods of contraception.

Q Did you consultant with any physicians at Providence Hospital or anywhere else in preparing the materials for this section?

A No, I did not.

Q Did you consult with any nurses or any person on the medical staff at Providence?

A No.

MS. HUNTER: Would you mark this O'Keeffe Exhibit No. 5?

(The document referred to was marked O'Keeffe Exhibit No. 5 for identification)

[39] BY MS. HUNTER:

Q Do you recognize the document marked as O'Keeffe Exhibit No. 5?

A Yes. This is the handout that I referred to earlier that was given out at only one of the St. Ann's presentations on contraception.

Q Who prepared this handout?

A This handout was prepared several years ago as a part of the natural family planning component as reference material. It was never given out in any kind of package. It was just when people requested information. It wasn't a regular handout. And I think I prepared it—again, it was several years ago—but it was taken from a book, and I don't recall the name of the book.

Q What was the book about? Can you describe it?

A It was a natural family planning book from a program in New York, Rochester, New York, I think, but I can't recall the name of it.

Q From a natural planning program in Rochester?

A Yes.

Q Do you know whether it was published by a Roman Catholic affiliated organization?

A I don't know. I don't recall.

[40] Q You say it was used in the St. Ann's program once, is that correct?

A Yes.

Q Why was it only used once?

A Mainly because it had been so long since it was put together that I was unsure of its accuracy and I didn't want to hand it out if there was anything doubtful about it. I knew that at one point this handout had a typographical error in it and I thought that it was revised, but I couldn't remember whether this was the revision or this was the copy with the error in it, and because I wasn't sure of its validity, I never gave it out again.

Q Did you prepare any similar handout after that?

A No.

Q Any handout that dealt with methods and side effects of contraception?

A No.

Q Was there any reason that you didn't prepare such a handout?

A No. Lack of time.

Q Did you show this particular handout to any of the medical staff personnel at Providence or elsewhere?

A No.

Q Was this handout modeled on any other handout that [41] you had seen?

A No. It was just taken from that book several years ago.

MS. HUNTER: Let me have this marked as O'Keeffe Exhibit No. 6.

(The document referred to was marked O'Keeffe Exhibit No. 6 for identification)

BY MS. HUNTER:

Q Do you recognize the document marked as O'Keeffe Exhibit No. 6?

A Yes. This is an article from Red Book magazine.

Q And is this one of the handouts that has been used in the Title XX program?

A Yes.

Q Is this still being handed out?

A Yes.

Q Why did you select this as a handout?

A Because I thought that it explained the risks of the IUD in a way that would be easily read and understood by the girls at St. Ann's that would capture their attention.

Q Were there any handouts that you used in the contraception session, other than these two exhibits, No. 5 and [42] No. 6?

A No.

Q Did you feel that these two exhibits represented the most comprehensive and most accurate information available concerning contraceptive devices?

A Certainly not.

Q Then why did you hand out only these two?

A Mainly because the bulk of the presentation is not based on handouts and the facts that the girls often aren't motivated readers. They are not girls who really are interested in doing that much reading and studying. The bulk of the presentation is the oral presentation and they weren't meant in any way to be comprehensive. They were just things that I had come across that I thought might be helpful.

Q But, I take it that the girls did not physically take with them any other materials on contraception from this session other than these two?

A Some of them did take the book that I referred to before, "Birth Control-Why Are They Lying to Women".

MS. HUNTER: Off the record.

(Record temporarily suspended)

BY MS. HUNTER:

Q Why don't you just identify these? These are the [43] only ones in natural family planning and the rest are—

A They are the ones I mentioned here today.

MS. HUNTER: Why don't you just mark these as the next exhibits?

(The books and pamphlets referred to were marked O'Keeffe Exhibits Nos. 7 thru 15 for identification)

BY MS. HUNTER:

Q Ms. O'Keeffe, would you look at Exhibits 7 through 15 and tell me if all of those exhibits are documents that you previously described that are handed out in the St. Ann's program?

A Yes, 7, 8 and 9 are handed out to each participant and 10 through 15 are provided as resource material for those girls who wish them.

Q And on what basis did you select those materials to be resource materials?

A We were looking for materials that stressed self-discipline and responsibility in the area of sexuality and these were the only ones that I was aware of, with the exception of "The First Nine Months of Life" and "Fertility Awareness", which are simply physiological materials.

Q The other materials were written or published by [44] religious authors or publishers, is that correct?

A I don't have any idea of the religious affiliation of Dr. Espinosa, and I don't think Vantage Press is a religious press, but the others were written by priests.

Q And Dr. Espinosa is the author of which one?

A "Birth Control-Why Are They Lying to Women".

Q I am reading from "Birth Control-Why Are They Lying to Women", the first page of text, which is entitled "A Prolife Manual". The first sentence of that is "This pro-life work has tried to apply something not found in most other works on birth control, wisdom and knowledge". Further down on the page, "The pro-life answer to the antipeople approach is given with an introduction of natural family planning".

To your understanding, Ms. O'Keeffe, does this book reflect what might be called a pro-life or antiabortion perspective?

A From what you have read, I would suppose so, yes.

Q Have you never read the book?

A I had read sections of the book, but I don't think I ever read the full book. It is a book that is not particularly well written and it is a book that I apologized to the girls for when I presented it to them, because it does have some problems, but it was the only book that I could find that [45] seemed to be presenting a side of the contraceptive issue that a lot of the girls had not been exposed to before. All of them indicated in class that they had already received sex education in their schools and had an understanding of contraceptive methods. In fact, in some cases they were a little hostile about the contraceptive class. I was really looking more for books that didn't stress so much the pro-life issue as the exploitation of women by contraception that so often occurs.

Q When you say you wanted to present a side that hadn't been presented before, what side do you mean?

A I wanted them to understand a little more fully the history and development of contraception and some of the physical and emotional side effects that have been noted, as well as, like I said, some of the ways that, on occasion, women have been exploited by contraceptives, and I think it was a side of, the more negative areas, of the contraceptive issue that very often very few people are exposed to.

Q And did you make any attempt to present any materials that contained the more positive side of methods of contraception?

A No, mainly because I care about the girls a great deal and don't want them to be exposed to that harm, and in [46] conscience, I see very, very little positive about contraception personally, and that is mainly gleaned from comments from people who have come to me seeking natural family planning after using contraceptive methods, and I wanted the girls to see sort of the other side that those people had come to after their experience with contraception and only to share that side with the girls.

Q And so you, essentially, used a contraception class as a way to share that perspective with them, is that correct?

A Yes, and also because they had indicated that they had already received a more positive approach to contraception in their schools.

Q You mentioned that you thought the girls were sometimes hostile to the presentation. Can you describe for me what you mean by that?

A Well, they often would say that they didn't understand why they had to be there, that it was too late now, you know, in terms of contraception, and I remember on one occasion a girl being very much opposed to the class because she said that she did not believe in contraception and didn't want to listen to anything about it and wanted to leave.

Q And did any of the girls ever indicate that they believed in, essentially, the more positive aspects of contra[47]ception?

A There was a good bit of discussion in the contraceptive glass. Some of them indicated that they used contraceptives in the past. Usually, for example, when I began to present on the pill, there was usually somebody in the class who said that doesn't work, I used it, you know, or something to that effect. For the most part, I would say no, they were not prejudiced against contraception—for the most part. I just recall the one girl who was really opposed to contraception.

Q Had all of the girls in the class received prior sex education in public schools?

A I wasn't there when the question was asked, but Mrs. Lanctot reported to me that she asked that question in her section and was advised that they all had received sex education in schools.

Q Have you ever sat in on any of the public school sex education classes?

A Not actual classes with adolescents, no. I have been to presentations on different materials available in public schools and, you know, different things for sex educators in the area.

Q I presume that the girls in the program did not all come from the same public school system, is that correct?

[48] A That is correct.

Q What public school systems did they come from?

A I don't know.

Q Did you make any effort to ascertain exactly what the content of their sex education classes had been?

A No. Again, Mrs. Lanctot was the one who asked that question, and I don't know to what extent she pursued it.

Q In the course of your presentation on contraception, did you inquire as to what they had been previously taught about contraceptives?

A No.

* * * * *

[51] Q Let me now show you O'Keeffe Exhibit No. 18. What is that?

A This is the adolescent component from the Rainbow program.

Q And does that include the fertility awareness section?

A Again it includes the fertility awareness section that was based on this, but—

Q Just for clarification, you mean the fertility awareness section of the Title XX funded St. Ann's program was based on Exhibit 18?

A Yes, some of it was gleaned from here, but this, per se, isn't exactly used.

Q How is the St. Ann's program different from what is in Exhibit 18?

A Because Mrs. Lanctot teaches that section, I can't tell you exactly what is different, but I know that some of the examples and some of the wording here is inappropriate for the girls at St. Ann's and wouldn't have been used.

[52] Q Why would it be inappropriate?

A Well, mainly because it is geared more to girls who are not pregnant, so the whole section on Jennie and Tom and their being faced with a pregnancy has already occurred for those girls and they have already dealt with those issues, so it would be pretty boring for them. The explanation of the reproductive system would be the closest to what is actually being done at St. Ann's, and again because of the diversity among the group at St. Ann's, and often the lack of diversity in other groups that we present the Rainbow program to, some of the things that are in the Rainbow program wouldn't be used at St. Ann's. Most of the time the Rainbow program is presented in Catholic schools or Catholic Church groups and the emphasis that is in part of the Rainbow Program would be inappropriate at St. Ann's.

Q What emphasis is that?

A For example, on page 20 of Exhibit 18, this is a reference to what the church has taught and that wouldn't be presented at St. Ann's.

Q Other than that particular reference, are you aware of any other part of that program or that program segment that would be altered for the presentation to the St. Ann's program?

A Well, again I can't say for sure, because Mrs. [53] Lanctot teaches it.

I see another reference up here to spiritual intimacy, and I am not sure how much she goes into that at St. Ann's.

Q Is the concept of sexuality as God's gift to individuals included in the program as it is presented to St. Ann's participants?

A I doubt very much that it is presented in that way. I think it is presented as fertility as a marvelous power, but whether it is specifically a God-given gift, I would doubt very much that it would be presented that way at St. Ann's.

* * * * *

[83] Q Would you characterize St. Ann's as being clearly a religious institution?

A It certainly is an institution founded by a religious order, but in terms of the way the girls are dealt with, I don't think it has a particularly religious orientation at all.

Q It is staffed by nuns, is that correct?

A Partially, yes. The administrative staff are Daughters of Charity.

Q How do you think the atmosphere of it, to the extent that it is religious, impacts upon your component of the program?

A Very little. I think a lot of people have been disappointed by the lack of religious affiliation that St. Ann's has in terms of the actual impact upon the girls. I don't really see that that has any impact on our component.

Q Are the classes that you do, are they at the Center for Life or at St. Ann's?

[84] A No, they are at St. Ann's, in the school. St. Ann's has an area where they have an accredited high school and that is where the classes are held.

Q The building of St. Ann's itself, are there religious symbols or religious pictures, and so forth, in the building?

A Yes.

Q It is clear to, I would assume, to any visitor that it is a religiously affiliated institution?

A Oh, yes, from the externals, yes.

* * * * *

[96] Q Well, the philosophical, to the extent that Exhibits 10 through 15 are philosophical, they are the same materials that you use in the St. Ann's program that are listed in the bibliography for the Rainbow program; isn't that correct?

A That is correct.

Q So it would be fair to say that that is the same philosophy, isn't that correct, since it is the same materials?

A Well, again, as I have testified before, the reason that those materials were given to the girls were because they stressed self-discipline and responsibility in sexuality and because they presented a different view, also, than I thought the girls had been exposed to, so I didn't see any need to present more information from other points of view when that is what we were trying to accomplish. Self-discipline and responsibility are not, in my view, religious values, but are human values that all of us are better off in being able to live within.

Q And the views on self-discipline that are represented [97] in the materials, or at least partly so, the views that are represented in the materials, they are the handouts in the program, I would assume; is that correct?

A Yes. The only thing is I am not aware of other materials that stress self-discipline and responsibility that don't have some of the other things attached with them. If I knew that they were available, I certainly would have provided them, but I am not aware of any information that separates the philosophical or presents some of that emphasis on responsiblity without also presenting information that could be construed as religious.

Q So what you are testifying, then, is that you believe that or you are characterizing your presentation in the St. Ann's program as not religious, bu the materials that you give out are religious materials which, to your knowledge,

are the only ones available which espouse your beliefs or the program's beliefs as to self-discipline, and so forth; is that correct?

A In our research, in trying to revamp the program, we are coming across some other materials that might accomplish that, but at the time when we developed this, I wasn't aware of them.

Q And, again, with regatd particularly to the contra[98]ception unit of the program, the only materials that you felt adequately reflected your side or your view of contraception are the materials that we previously discussed and that were handed out; is that correct?

A Well, again, I don't think that those materials were adequate. As I said, I think they had inherent problems of their own, and I was disappointed in them, but I had nothing else better.

Q Do you believe that the presentation that you made on contraception; that is, as to the negative side effects of methods of contraception, other than natural family planning, is an accurate scientific presentation as to method of contraception?

A Yes.

Q Are you aware of any authority to the contrary?

A No. The facts that I presented are facts, historical and medical facts.

Q And you did not consult with any physicians or other medical staff to verify that, is that correct?

A No.

Exhibit 4

Curriculum at St. Ann's

INTIMACY III St. Ann's Class 4

* Sign-up sheet.

Based on Walter Trobisch's *I Married You*.

Last week: talked about friendship – intimacy, importance of communication – all the areas possible – in trust.

Traditions of MARRIAGE, its development (elaborate on why).

All cultures, very strict rules.
Christian tradition – developed from Jewish and Old Testament.
Only mentions marriage as such four times:
Genesis
Two Gospels, Matthew 19 and Mark 10:7
Paul relating to Ephesians 5:31
Genesis 2.24: Therefore a man leaves his father and his mother and cleaves to his wife and they become one flesh.

Three essentials to marriage –

1. Leaving – formal. Public announcement, preparation, marriage license, public statement.
   Leave parents – like child born, cut cord.
   Hens raising duck – stand on bank and cackle.
   If not leaving parents and past attachments – trouble.
   Leave, not abandon – parents trouble accepting this; in-laws.
2. Cleaving – only really cleave if have left. Stick to, pasted (ex, paper, if you try to separate it, it tears).

Closer than to anyone or anything else, even job, profession.
More important than friends, visitors, sports, and even children.
Problems with first child: wife shifts attention, husband outside.
Cleave: old time – against polygramy of OT times, King David, etc. now – successive polygamy, divorce, string out marriages.
Cleave – love, not used here. Special love, decision made. No longer groping and seeking. Mature love, decided to remain faithful to one person and share whole life.

3. One flesh – Describes physical, sexual aspects of marriage. As essential as legal and personal aspects. Often think of body as nothing to do with God, body is good. Spirit in us. Speak of bod – accept and regulate important. Hard for most people to talk about, do. Not too awful or too holy. Sex – made by and belongs to God, way to Creation; can and must talk about it. One flesh means share all – bodies, material possessions, hopes and fears, successes and failures, strengths and weaknesses.
   Become one: body, soul, spirit; remain two different people, strong. Symbol of Liberian couples – one work of art.

Three parts inseparable:

Leave: public, legal wedding



Cleave: love, faithfulness

One flesh: physical union, sex, possessions

Couple, child not mentioned. Blessed them, then be fruitful and multiply. Child does not make the marriage; childless, still couple.

Garden Concept:

woman – condemned for adultery.

buyer – pays for, goes from garden to another plant's seed.

Western, post-Christian. Makes both buyers and sellers. Does not stabilize or grow.

Will of God

triangle, tent

leave

dynamic triangle, meets persona! need every cultural and situation.



love, faithfulness

one flesh

Empty marriage, no love, lacks cleaving, too absorbed, becomes seriously ill, infidelity. Not marriage which causes this but the lack of love.

Movies – husband looks for someone to fulfill these needs, jealousy, mental unfaithfulness to the real thing.

Stolen marriage –

Greatest in our time, think sex and love = all.

Top of tent not there, rains in; children deprived of wholeness of tent (marriage and father).

Real handicap for love –

Premarital, sometimes undignified, hurried; love cannot flower.

Fear of leaving if pregnant, etc. Undermines trust. Love does not have chance to show its desirability.

Unfulfilled marriage --

Lack of development of sexual; tremendous suffering; couples different energy levels and sex interest. Should woo each other, make effort, grow.

The wedding entrance – p. 44, Fiddler. Often neglect love.

Sex entrance – love does not grow out of sex, love grows into sex. Outside of marriage, danger of egotistic reasons:

boy
(Learn by doing
(Likes feeling
(Thinks it is necessary

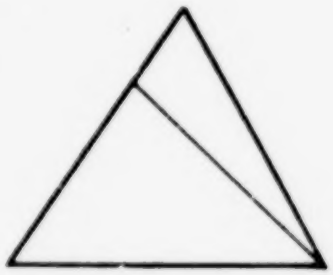
girl
(Hopes to bind him to her
(Likes the feeling
(Wants a child

Sometimes, often, leads to hate rather than love (Amnon and Tamar, II Sam 13).

Love entrance – intimacy.

Unbalance triangle, tent falls.





No one – waiting, hurt
some – maybe did good
Far more –

INTIMACY IV St. Ann's Class 5

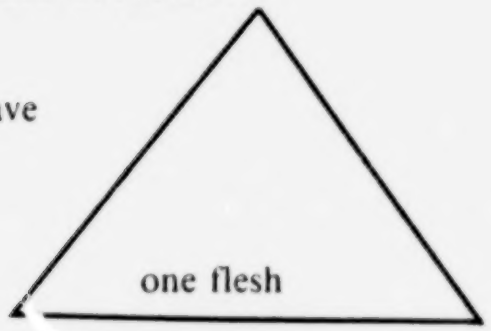
Societal – religious traditions and marriage.
All societies, basic rules.
Protection of passing on species.
Some, protection of woman and child

Two basic approaches.

Chinese	*Garden*
African	is brought,
	receives seed,
	grows it,
	stays put,
	is transferred
	Gardener
	buys, "bride" price, fertility,
No necessary	plants,
growth of	disposes,
love and	moves from garden to garden
self-respect.	

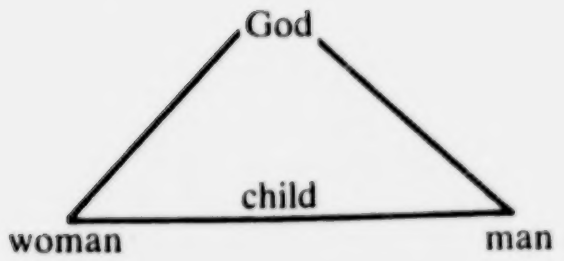
Our modern philosophy: women can go about like men.

Judeo-Christian:



two parents,
sharing deepest level.

Don't iike the angles.



Creator – just creatures, not
alone, plan our initiative.

God – love and life. Closest to him – making love and privilege of giving life.

Not alone.
Difficult –

1. Set goals – develop support groups.
2. Living with unfulfilled desires – time right, me and him in view of goals, what building toward.
3. Prepare for marriage –
   discussion groups
   church groups.
4. Caring for each other, the good – over next 50 years.
   Man (husband)
   Child
   Self.

Ultimate goal –
Why am I here?
Who can help me understand this and live it responsibly?

Exhibit 5

Handout Used in St. Ann's Curriculum

Reliability	*Method*	*Possible Side Effects*
99.99%	Abortion	Sterility, death, surgical complications. In subsequent pregnancies: greater risk of hemorrhage, longer labor in all three stages, 4 times higher incidence of complication with the placenta, increased risk of miscarriage, increased risk of premature birth.*
99.96%	Female Sterilization	Tubal pregnancy (can be fatal), surgical complications (can be fatal), Heavy menstrual bleeding, painful cramping, increased incidence of pelvic disease.
99.85%	Male Sterilization	Painful immediate reactions, long-term continued discomfort, aching testicles, low-grade fever, surgical complications, impotence (psychological), premature ejaculation, absorption of unejaculated sperm by surrounding tissue may stimulate auto-antibodies (antibodies against self rather than against invading micro-organisms) which could cause complications, non-reversible.

Exhibit 5—Continued

Handout Used in St. Ann's Curriculum

Reliability	*Method*	*Possible Side Effects*
99% **	Pill	Death, sterilization, heart attack, stroke, cancer, paralysis, abortion, cervical erosion, migraine, depression, vision impairment, high blood pressure, gall bladder disease, liver tumors, birth defects in offspring, carbohydrate and lipid metabolic effects, ectopic pregnancy, bleeding irregularities, nausea, vomiting, abdominal cramps, bloating, edema, chloasma, melasma, breast tenderness, change in weight, suppression of lactation, cholestatic jaundice, rash, changes in sexual desire, blood clots, changes in appetite, cystitis-like syndrome, nervousness, dizziness, fatigue, backache, hirsutism, loss of scalp hair, erythema multiforma, erythema nodosum, hemorrhagic eruption, itching.
99%	Natural Family Planning Sympto-Thermal and Temperature Methods	NONE

Exhibit 5—Continued

Handout Used in St. Ann's Curriculum

Reliability	*Method*	*Possible Side Effects*
98.6%	Natural Family Planning (Ovulation Method)	NONE
97%	IUD	Abortion, cramping, bleeding, death, perforation of the uterus, increased risk of miscarriage, ectopic pregnancy, septic abortion, septic uterine infection, pelvic inflammatory disease, endometritis, sterility, heavier menstuation, backache, cervical erosion, vaginitis, allergic reaction.***
88%	Diaphragm with Creams or Jelly	Vaginal irritation from creams or jelly, increased risk of birth defects.
85%	Condom	Vaginal irritation, decreased sensitivity, increased risk of birth defects.
75%	Calendar Rhythm	NONE
72%	Foam	Vaginal irritation, increased risk of birth defects.
63%	Cream and Jelly	Vaginal irritation, increased risk of birth defects.

Exhibit 5—Continued

Handout Used in St. Ann's Curriculum

*Reports from countries which have had legal abortion for many years (England, Japan, Sweden, etc) indicate the following: 4-9% increase in sterility; 100-150% increase in extrauterine pregnancies 40% increase in premature births; 43% increase in infant deaths from congenital malformations; four times greater incidence of pelvic infections, menstrual disorders, etc.

**The original studies in 1958 showed the pill to be 87% effective, with no known side effects. The present 99% figure does not include the mini-pill, which although it may have less severe side effects for the mother, is much reliable (97%). It does not attempt to supress ovulation, but works by changing the cervical mucus, the contration rate of the fallopian tube, and changing the lining of the uterus so as to keep the embryo from implanting in the womb (that is, it causes a very early abortion. The combination pill works by the same machanisms, although it also probably supress ovulation some of the time.

***The IUD works by causing chronic inflammation of the uterine lining, preventing implantation, or dislodging the embryo. It doesn't prevent ovulation or conception.

Exhibit 12

Excerpts from J. McGoey, *Sex, Love and the Believing Girl*

CHAPTER TWELVE

Masturbation

* * * * *

129. ***Why has the evil of masturbation been exaggerated?***

Sexual sins are not the worst sins committed. However they are sins which do affect your basic need to develop the loving, woman-man relationships so vital to your happiness. Many well-meaning teachers of sexual morality, rather than challenge people to be strong, filled them with "fear" of evil, as the easiest way to keep them out of trouble. They did not understand just how unhealthy it was to pit the emotion of fear against the sexual emotions, or how useless it was to expect virtue to result from that fear. In an honest but futile effort to help people to avoid masturbation, many bad effects were wrongly attributed to the masturbation which was itself the result of emotional problems, rather than their cause. Virtue, not fear, is the cure for sin. The bad judgment and ignorance which caused these well-meaning teachers to make such a mistake is more than matched by the stupidity of modern teachers who declare masturbation to be no sin at all, when the disastrous evidence of such an attitude lies in the devastating effects before their very eyes. Those who stupidly exaggerate the evil of masturbation do less harm than those who insist that it is a perfectly normal outlet for emotional tension. Masturbation is an obvious form of addictive selfindulgence, at odds with the selfdiscipline necessary to become a loving person, – forgetful of self, thoughtful of others.

130. ***How damaging is masturbation?***

The central theme of this book is that your personal maturity, happiness and fulfilment consist in becoming a truly loving person. The selfish, exploitative use of sex gives top priority, at least momentarily, to your own sexual pleasure. The greater your use of sex for this purpose, the harder it becomes to use it for your own real good, the good of your marriage partner and the good of society itself. Damage to your central power to love is the worst damage you can sustain. Everything that holds your attention on yourself takes that attention away from those you love. Masturbation does exactly that. It is typical of those "lovers" who, denied sexual indulgence by those they claim to love so much, threaten to go to others who will give them what they want. Nothing can compete with "what they want" in life. The habit of masturbation so conditions you to pleasure on demand that you have little concern for anyone you cannot manipulate to serve your own pleasure demands. Few habitual masturbators ever become loving people, happy people. Masturbation is about as unproductive as any habit can be. There are so many better things to do with your time, energy, attention and talent.

CHAPTER THIRTEEN

Lesbianism (female homosexuality)

* * * * *

134. ***Why do lesbians claim to express love genitally?***

They do this because of a misunderstanding of love, which is personal rather than sexual, and the common delusion that there is something essentially loving in the sexual act itself when, in fact, there is not. The homosexual movement (ironically called GAY) is a basically angry, unhappy and unloving group, united primarily in resentment of a world which will not accept their genital sexual activities as normal. They are drawn together by what they consider to be discrimination against them, in the common cause of survival in a hostile social atmosphere. Grasping neither the true nature of human sexuality nor the true nature of personal love, they are a confused, selfrighteous group. They feel more comfortable about, eager for and responsive to sexual activities with those of the same sex, who like themselves, seek genital pleasure which both parties choose to call love, but which is, in fact, merely mutual, genital satisfaction.

* * * * *

137. ***What are some explanations of the lesbian fact?***

The many conflicting opinions and general confusion about homosexuality make it plain that there is no simple, adequate explanation of the lesbian fact. However, there are several factors commonly observed in the phenomenon. Among them is the strong identification with a man-hating mother, wife of a fugitive husband who abandons his child. The actions of the husband and father usually came after a tempestuous, unhappy sexual relationship, and were followed by a protective and possessive

relationship with the daughter, who is "all the mother has". The mother has two missions, one, to hold on to her daughter and two, to save her from the bestiality of men. Other common factors in the lesbian fact are, the segregation of girls from boys in the sexual discovery age bracket; all girl families with little association with boys, where the first introduction to sex is with peer girls; situations in which the first love, friendship, affection, tenderness, understanding and sharing are with girls, and have genital impact which leads to sexual expression and experience. While these may by contributing factors, they are not sure, determining factors, There is no substantial evidence that childhood crushes of one girl on another, expecially an older girl or female teacher, have any lesbian significance, however common they may be as experiences of lesbians.

Another lesbian factor is the man-hating girl, who is by nature sexual but cuts herself off from normal, heterosexual experiences or associations, leaving herself open to lesbian sexual experience. There are many explanations for the man-hating girl. Many girls resent being born, like it or not, into a male-dominated world. Others resent physical beauty being the topmost criterion for male pursuit, while many, if not most males stupidly ignore finer women with superior talents, character and capacity for personal love.

* * * * *

147. ***How serious a matter is induced abortion?***

Abortion is always a serious wrongdoing, unless there are mitigating circumstances, such as genuine ignorance or outside pressure of such magnitude that it lessens or eliminates personal responsiblity. This would be true in those abortions enforced by the state, or against the will of the mother. No one has a right to have sex when there is no mutual intention to cherish, safeguard, protect and provide for the life that may be conceived. Abortion merely compounds the evil by adding the wilful termination of an innocent life to irresponsible sexual intercourse.

148. ***Is a newly generated human embryo, or fetus, a complete human life?***

A complete human life involves old age and a natural death. Nevertheless, a whole new human life begins at conception. There are those who doubt or deny this because of the obviously undeveloped condition of the new foetus or conceptus. However, science has now proven, beyond any reasonable doubt, that human life begins at conception. The conceptus, from the very beginning, has its own life, is a totally new human being, a new person, with a genetic code quite distinct from the genetic codes of its parents. Since the only life generated by human beings is human life, that new life is completely there at conception, lacking only development and growth. As for completeness, fundamental development does take place in the womb, however full human development takes place only outside the womb after birth.

149. ***Why is abortion immoral?***

However confused the motives, abortion always takes an innocent, already existing life. Since human life is the highest form of life on earth, man's greatest responsibility lies in generating other human lives responsibly. However, once generated, even irresponsibly, the new life is as sacred as the lives of its generators; it must not be interfered with as is done with abortion. The aborted foetus lacks only a few weeks of time, for full protection of the law. Abortion is even more serious if its only real, natural protector, its mother, remains silent or is an accomplice in the death of her unborn child.

150. ***If abortion is wrong, why is it legal?***

Legality is a matter of the laws of man and society. Many of these laws have been, and are, grossly unjust and discriminatory. Morality is a matter of the laws of God

and the Church, which laws, by their nature, have to be for the good of mankind. The breaking of these laws, therefore, is always detrimental to man, and society, and so is always a sin, immoral, regardless of legality.

* * * * *

CHAPTER FIFTEEN

Contraception

Contraception is a divisive issue, for,
those so willing to admit that "we are all sinners",
are mortally wounded when told that
anything they are doing is wrong.
But not to worry!
Wrong hurts and damages, and is
dearly paid for by the sinner in the damage
That is what wrong means and does, and,
in this sense, contraception is wrong, for,
it damages the love-life more
than the sinner knows, until
of course, it is too late.

153. ***What is contraception?***

Contraception is the use of chemical or mechanical agents to interfere with conception during or after sexual intercourse. Those so-called contraceptives which do not prevent conception but merely prevent the conceptus, or fertilized egg, from adhering to the wall of the uterus for gestaton, are not contraceptives but abortifacients, or abortion agents. They procure early miscarriage.

154. ***What does contraception represent?***

For the believer, contraception represents the mentality of those who under pressure of their own sexual desires, or the sexual desires of partners they would rather please than lose, have blocked out the demands of faith in God, who gave man the intelligence and willpower to control his sexuality and regulate his family naturally, lovingly. For

the unbeliever, contraception represents the mentality of those who have lost faith in man's ability or willingness to control himself, to love.

* * * * *

Even more, faith in God demands that people stop worshiping power, wealth and pleasure in order to start trusting in God for an infinity of unearthed treasures, to be shared in social justice, in loving service to neighbour. Contraceptives are indeed the tools of those who insist on eating, drinking and making merry, for today as for tomorrow, they could not care less for anyone else.

155. ***Is contraception wrong?***

It has to be wrong to interfere with the normal effect of any willfully chosen action. The whole design of the male-female genital systems is to produce sperm (seed) and ova (eggs), to be brought together through sexual intercourse to produce human life. Obviously then, sexual intercourse cannot be right between people who might, without contraceptives, bring a child into a situation lacking the two qualified married parents and the loving home which every child requires for its health, protection, guidance and development as a human being. The wrongness of contraception is even more obvious in the case of people having intercourse who are not only unmarried but have no intention whatever of being married. The contraceptives used are merely aids to mutual sexploitation. Contraceptives do not become a good thing because they are used to avoid the greater evil of irresponsible parenthood. They can only "seem" good in comparison to something worse. Worse can only be defined as the comparative degree of bad.

* * * * *

232. ***What is wrong with premarital sex?***

Uncontrolled premarital sexual desires generally lead to a marriage in which sex plays a far too dominant role. In the loving marriage, sex takes place when it is right and good for both people. Premarital sex takes place on emotional demand, or, whenever it suits one or both persons. Such sex develops an impatient selfindulgence detrimental to the direction of sex by love. A good marriage is rarely preceded by a bad relationship,—a relationship primarily sexual rather than personal. Those who have sex before marriage because they FEEL they have a right to it, being more pleasure than obligation-oriented, quickly learn how easily whimsy and desire take priority over duty and obligation in marriage. It takes a strong and very loving person to be faithful in the difficulties and trials of modern marriage, and in the face of threats to the security of that marriage by many other sexually attractive and available people.

The person who finds sex before marriage acceptable, will not, by the fact of marriage, find it unacceptable with others, after marriage. Those who make mistakes before marriage can change, and sometimes do. However, unless there is a change, the premarital infidelity to God will continue as marital infidelity. Few women who did not themselves have premarital sex, had reason to complain about the infidelity of their husbands. Many who had premarital sex to hold on to their fiances, learned sadly, that they could not hold on to them after marriage because they were not theirs before marriage. Among many others, they merely had been had by them.

* * * * *

Exhibit 14

Excerpts from J.C. Espinosa, M.D., *Birth Control: Why Are They Lying to Women?*

A Pro-Life Manual

This pro-life work has tried to apply something not found in most other works on birth control: wisdom and knowledge. The prevalent "how-to" approach forgets the transcendental dimension of man. In this work you will find the following: The anti-life content of the contraceptive philosphy. A presentation of methods of birth control and an extensive documentation of the many complications inherent to artificial contraception. A final documented proof of the abortifacient (abortion-inducing) capacity of the contraceptive pill and other hormonal methods of birth control. Next, there is a brief history of the progression of the anti-life philosophy—birth control to population control to abortion. The pro-life answer to the anti-people approach is given, with an introduction to Natural Family Planning. The last chapter sets everything in proper perspective. It stresses personal responsibility and shows the tremendous human development of which we are all capable through the practice of Poverty (respect for the ecology), Chastity (respectful love), and Obedience (to our incarnate nature).

* * * * *

The contraceptive philosophy shows a total lack of faith in God and man: man cannot take care of the problems that may arise from people, and God has created too many people.

* * * * *

These are not, properly speaking, either birth control or contraception methods, because neither conception nor birth is "prevented." They just do not occur. Natural methods rely on the natural rhythms of our natural

bodies. Women cannot become pregnant at all times, but only around the time of ovulation. The ovum lives for only 12 to 24 hours. This knowledge can be employed in order to space children and plan a family adequately. Nothing artificial is introduced, and that which God has placed naturally together in sexual intercourse (love and procreation) is not separated.

* * * * *

We are the apple of the eye of the Father. The capability of our bodies to procreate is the highest physical gift that we possess. We can contribute to making something out of nothing. Out of almost nothing: two little and incomplete cells (sperm and ovum). Where there was nobody, there is now somebody (you, I, the rest of humanity). The sperm and the ovum die naturally if conception does not take place.

To build a home we have to buy materials; to make the greatest of physical creations, married (or unmarried) love suffices. Let us cherish and respect that greatest of gifts.

If we throw away or misuse the gifts with which our Creator has blessed us, we are truly insulting Him. We should use our gifts wisely, as our nature and our minds tell us to. We have a certain number of talents, and some life in which to develop them. As the true saying goes: what you are is God's gift to you; what you make of yourself is your gift to God. We are given the raw materials and the gifts to develop them. Let us not bury our talents but develop them for our benefits, for the benefit of others and for the glory of God. "For the glory of God is a living man" (Irenaeus).[4]

* * * * *

It is not right to pit woman against man to see who can develop more or further. The goal should be for both man and woman as *one* to grab each other's hand and *advance*

HUMANITY together toward sure final fulfillment. People are the flowers of God's garden. Like flowers, we come in all shapes, colors and fragrances. Our mission is to tend and improve the garden, not to choose which is the fairest of them all, which should remain subdued, or which ones should be exterminated. As long as you talk of women's rights or men's rights or any other particular group's right, you are creating categories that war against the harmony which the survival of the human race requires.

* * * * *

Most times the jolt into awareness is gradual. Mahatma Gandhi, the prophet of nonviolence, said that *Truth is God.* God went to Jeremiah not in the storm, or in the lightning, or in the thunder, but in a gentle breeze. The manifestation of God, of Truth, for us will also be more like that gentle breeze. Therefore we must be attentive! All truths are partial finite revelations of the Ultimate Infinite Truth. The progression toward that Ultimate Truth is the very meaning of life. The realization of the goodness of human life, of our inescapable duty to protect it, is a fundamental step along the ladder we must ascend. There is a quick easy elevator going in the opposite direction and the anti-lifers have chosen the route that through lies leads to death. The gentleness with which we should approach human life has transcendental roots: "To me you shall be sacred; for I the Lord am sacred." (Lev. 20:26). To work in the pro-life movement you should, in a way, "Take off your shoes, because the ground on which you are walking is holy." (Ex. 3:5) Awareness includes the perception that there are ideas which seem at first sight to pose no threat, which later become the most destructive and anti-life. Witness the judicial development of the "right to privacy." In 1965 in Griswold it meant contraception in order to attain less children. Then in 1973 in the abortion decisions it meant the massive killing of the innocent. In 1976 the

"right to privacy" was also used in the Quinlan case in New Jersey to force physicians to disconnect a respirator and thereby cause Karen's death. The fact that she still lives shows that man does not live by respirators alone, "but by every word that comes from the mouth of God." In this case she lives like all of us: by the mercy of God.

* * * * *

Exhibit 15

Excerpts from D. Knight, *The Good News About Sex*

Nihil Obstat:
Rev. Hilarion Kistner, O.F.M.
Rev. John J. Jennings

Imprimi Potest:
Rev. Andrew Fox, O.F.M.
Provincial

Imprimatur:
+Daniel E. Pilarczyk, V.G.
Archdiocese of Cincinnati
July 12, 1979

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* * * * *

7.

Being A Word Made Flesh

Expressing our relationship with Christ

Jesus is the answer to the *why* of human living.

Why did God make us? For relationship with himself.

Why do we exist? Why are we alive? To enter into relationship with Jesus Christ, and through him into relationship with God.

If we become disciples of Jesus, we are recognizing the basic *why* of our existence. But where do we go from there? Where does discipleship lead us?

We are called, as disciples of Jesus, not just to learn from him, but to express what we learn. Those who come to Jesus as disciples he sends out again as witnesses and apostles.

There are no simple "followers" of Jesus. Everyone who follows him must learn to *lead.*

Through his teaching and example Jesus offered new options to mankind, options that transform entirely one's way of relating to other people, to work, to family, to life and to death:

* * * * *

The challenge of living as the body of Christ in everything we do can be enormous. It can seem overwhelming at times. Yet this is the *why*—and the glory—of our existence.

Part II:
The Good News About Sex

The good news about people is that we are called to the fullness of life. We are called to this through relationship with Jesus Christ. We are called to live simultaneously on four levels: the physical, the cultural, the personal and the transcendent, which means "spiritual" or "graced."

The good news about sex is that it has meaning and values on all four of these levels:

- As a physical reality, sex is delightful, life-giving and human.
- As a cultural reality, sex is enriching and challenging.
- As a personal reality, sex creates us as loving persons; it brings our love to life and makes us one with each other.
- As a graced reality, sex is God expressing himself through us.

In the chapters which follow, we will explore the meaning and value of sex on each of these levels. We begin with the physical reality of sexual intercourse as an expression of our humanity.

* * * * *

The reason why human beings, like other mammals, come in two varieties—male and female—is in order to reproduce.

Some people would take issue with the words, "in order to." "Human beings are not male and female," they would argue, "*in order to* reproduce. They just happen to be male and female; and as a consequence they *can* reproduce."

To say this is to reject—on the level of sexuality, at least—one of the basic arguments for the existence of God: the argument from design.

* * * * *

Exhibit 16

Used in Center for Life Adolescent Program

THE RAINBOW PROGRAM

INTRODUCTION

Since the spring of 1980, the Center for Life of Providence Hospital in Washington, D.C., has been providing a unique outreach program in adolescent fertility awareness for teenagers and parents of teenagers in the nation's capital.

Now this highly successful curriculum is being made available as the RAINBOW Program to groups across the country who want to help adolescents better understand the beauty and power of their procreative potential and who want to help improve communication about sexuality between teenagers and their parents.

Working in schools, church groups, and youth centers, the RAINBOW Program teaches teenagers about the power and responsibility of the body's life-giving potential through a sensitive presentation on the physiology and natural cycle of human fertility. Through a lecture format, with frequent pauses for questions, the instructor presents the miracle drama of fertility with the help of a few carefully chosen slides.

By acquainting young people with the marvelous signs of fertility alive in their own bodies, the RAINBOW Program provides not only a more Christian, pro-life education in sexuality than that available in the public sector, but also fosters in teens a sense of wonder and respect for their bodies that connects sexuality to the transmission of life and places them both solidly within the context of committed marital relationships.

* * * * *

The formulators of the RAINBOW Program firmly believe with Pope John Paul II that ". . . the delicate responsibility for sex education belongs principally to families, where an atmosphere of loving reverence will be conducive to a fully human Christian understanding of life and love." (L'Osservatore Romano, English ed, 2 March 1981, p. 5).

* * * * *

Exhibit 18

The Rainbow Program Curriculum: Adolescent Component" Used in St. Ann's Program

* * * * *

Your fertility is a marvelous gift. Rejoice in and protect it. Come to know yourself as a beautiful, sexual being so that you can use your power to love in the most positive, wonderful ways.

Suppose Ginny and Tom had known these things clearly: if each had thought about self as a unique gift, as someone with a future to prepare, a future as a husband or wife, as an educated and knowledgeable person; if they had recognized the tremendous power of giving new life they were playing with and the responsibility they had towards each other to protect the other and help the other to become a better person through their friendship.

Suppose how different it could have been if they had really thought about the other as a special creation of God with the life of Christ in him or her; as someone's future spouse, a future parent; someone to care for, to cherish and protect.

* * * * *

The Church has always taught that the marriage act, or intercourse, seals the union of husband and wife, (and is a representation of their union on all levels.) Christ commits Himself to us when we come to ask for the sacrament of marriage. We ask Him to be active in our life. God is love. We ask Him to share His love in ours, and God procreates with us, He enters into our physical union with Him, and we begin new life.

* * * * *

Exhibit 25

Comments of Participant in St. Ann's Program

Anatomy and fertility awareness lecture: Very good. Everyone learned or relearned something. Definitely sparked interest in natural family planning when lecture on problems with other methods of birth control was presented.

Birth control methods: Very good lecture. Didn't really explore the advantages of one type over another, but it did let the problems of each method be known, literature given out was very good. I noticed many girls reading the literature.

Levels of Intimacy: As far as I know, every girl thought this lecture was boring and a complete waste of time. These girls barely know how to establish and maintain casual but honest friendships, much less how to work on a relationship through the nine levels of intimacy. Perhaps the time would be better spent on how to better develop interpersonal relationships. Many people aiso thought the time spent on the importance of "leave, cleave, and become one flesh" was meant to be a "preached sermon." These girls are especially (perhaps overly) sensitive to being preached at. Since it evident that we all participated in premarital sex, and since some girls plan to keep their babies whether they have the father's support or not, it is kind of late to speak about the importance of marriage before having children.

Exhibit 26

St. Ann's Adolescent Family Life Project

Initial Progress Report
June 15, 1983

I. *Narrative*

1. *Achievement of program objectives to date:*
The overall goals of the family life component are being met, although we are having difficulty in meeting some specific objectives. In the fertility awareness component presentations to parents have been made but with very small attendance. The contraception component did not have adequate class time to achieve all objectives because of scheduling problems at St. Ann's. Class time geared to the original specifications for all modules are now being planned for summer and fall sessions. Only 2 or 3 girls out of a class of 25 opted for the NFP component and follow-up on these few is proving difficult due to their somewhat transient situation. It may be better to target girls for NFP who are participating in the resident aftercare program. The Intimacy Module is meeting all objectives in that values are being presented. There is some concern, however, that many girls see no need to examine their relationships and/or see no areas of their lives in which "healing" is needed.

2. *Changes in implementation:*
a.) The Intimacy module is now being given before contraception.
b.) There are now fewer presentations in the Contraception section and more presentations in the Intimacy section
c.) The amount of time available per class in the first cycles was only about ½ the amount specified in the proposal. This has been corrected by St. Ann's staff for future cycles.

3. *Progress to date in service delivery:*
See statistical information

4. *Status of innovative features:*
The major innovative feature of the Family Life Education component is the attempt to develop responsible attitudes and behavior with regard to sexuality. As this goal is addressed, issues surrounding self-image, friendship, intimacy, commitment, marriage and sexual expression are explored, among others. Helping these young women better understand the unique worth of each individual may impact on other areas of their behavior as well and may be a slight factor in preventing child abuse and neglect. Involvement of the family is encouraged, although parental attendance has been low. The putative father's involvement is also encouraged, especially in the modules on intimacy and natural family planning. Follow-up for Natural Family Planning is proving to be difficult, although adjustments are being made to assure continuity of care.

5. *Problem Areas:*
a.) Time problem with short class sessions – resolved
b.) Limited, if non-existant capacity to follow girls after delivery. No apparent support structure for girls who make a decision to avoid pre-marital sex in the future.

6. *Significant accomplishments:*
a.) A few girls have expressed to the teacher their resolution to avoid intercourse in the future until marriage.
b.) Some girls have admitted to St. Ann's staff that they have learned things about their sexuality that they had not known before, though they thought that they knew every thing there was to know.

c.) Some girls have stated that as a result of the class they better understand the importance of the unity of the life–giving and love–giving aspects of genital intercourse.

7. *Unanticipated outcomes:*
None.
8. *Philosophical base which shapes our model for service delivery:*

Our philosophical orientation is that sexuality as a God-given gift to be used with reverence, respect, and restraint not as a right which may be exercised whenever and however it can give pleasure. This is a viewpoint which is not widely shared in our culture even among among adults who are actively affiliated with their church. It is a view of sexuality which is even less widely shared by modern teenagers who have grown up on a diet laden with sophisticated material diversions, utilitarian approaches to goods and services, and near–instant gratification for almost every need. Within such a context the use of sex for fun is eminently logical. On the other hand, the central message of our program, that genital expression of intimacy is appropriate only within the context of a marital relationship and that intercourse should be postponed until marriage, often appears as a senseless, even cruel attempt by "authority" to deny teenagers a "good" which is their's *by right*.

For the girls involved in the St. Ann's project their sexual activity, however fleeting, however loving or unloving, has resulted in conception–to some girls a stroke of bad luck, to others a punishment, to others the fulfullment of their plan to rebel or to finally have someone to love. Most of the St. Ann's adolescent family life project aims at helping the girls to take the practical steps necessary to deal with their new situation, upholding their dignity and that of the

new human life they are bringing into the world, a dignity given by God and not by the circumstances of conception. The heart of the Center for Life contribution is helping the girls to re-examine their *inner* life, their image of themselves and the ways in which they have chosen to express themselves through their sexuality. Realistically, this goal is a very ambitious one given the limited time available. At worst we may be able only to present some new information in a way that says we care about each girl as a unique gift of God in herself. At best we may strike the spark for a change of heart within some girls who may begin to see chastity less as a way of self-denial and more as a way of real love, less as a source of embarassment and more as a badge of honor.

9. *Budgetary impact of experience to date:*
Because the number of program participants are lower than was expected, expenditures will probably be less than anticipated in the budget for the project period.
10. *Additional Comments:*
How is the work that we are doing in this project different because we believe in Jesus Christ?

Exhibit 27

1983 YEAR-END REPORT
January 4, 1984

Natural Family Planning

Great strides were made in the NFP program to improve the quality of instruction. Using materials from the St. John's (Milwaukee, Oregon) NFP program as a base, class content and instructional materials were updated and expanded. Although there are still improvements to be made in the client manual and the visual aids, classes have been revamped to include advancements in NFP research over the last several years.

* * * * *

Instructor knowledge was enhanced by monthly inservice meetings and participation in the Pittsburgh conference and the Diocesan Directors' meeting. In addition, teachers were provided with in-depth information on new NFP material, management of the breastfeeding client, and the biophysical properties of cervico-vaginal mucus. An intensive instructor training program was initiated in September through which four instructor-trainees have completed their didactic training (Phase I). This training allowed our other instructors to participate in three special sessions co-sponsored by the Archdiocese of Washington NFP and St. Agnes NFP: Moral and Ethical Issues in NFP, Public Speaking, and When to Refer to a Physician.

Deposition Excerpts of
Mercedes Wilson,
Executive Director,
Family of the Americas Foundation

[Direct Examination by Mr. Sims:]

[14] Q The second page says The Christian Alternative, Billings Ovulation Methods. What does that mean?

A It was a program that we used in Christian schools.

Q How is the Billings Method a Christian alternative? Will you elaborate on that?

A I don't know that I could elaborate on it. It's just what it says, an alternative to artificial methods.

Q What is Christian about that?

A Well, that most Christians would prefer a natural method, or if they are not aware, they would be interested because most Christians defend the natural laws or protect natural laws.

Q Turning back to the project summary, did the Families of the Americas – for how long has the Families of the Americas Foundation had programs for [15] adolescents and families?

A We really have all – we have been teaching in the schools for many years. I can't recollect the exact number of years. It could be eight, nine, six. I am not sure.

Q Here in Louisiana, which schools have you been teaching in?

A Mainly in my local school in Covington.

Q Is that a public school or private school?

A Private school.

Q What is the name of the academy?

A St. Scholastica Academy.

Q Is that a parochial school?

A Yes.

Q Have you taught in any public schools in Louisiana?

A Not myself because the law of Louisiana doesn't allow it, but we have been invited.

Q You have been invited?
A Yes.
Q People who work with your organization?
[16] A No, we have been invited by some of the students or parents, but the law does not allow sex education in schools, but in private schools, you are allowed.
Q Aside from doing some teaching in the private schools, what other activities have you undertaken in Louisiana for adolescents?
A Well, whenever I get invited to universities, private or public, I have given lectures, yes, in the biology classes.
Q Was there a point at which you decided to expand the services which the Families of the Americas Foundation provided for adolescents?
A We have always been trying to expand and when Senator Denton's bill appeared, we decided to request for a grant.
Q So that the grant you requested is part of your effort, continuing effort to expand your program for adolescents?
A That's correct.
Q Are you aware that the Act encourages the involvement of religious organizations in pursuing the goals that the [17] Act sets forth?
MR. WILSON:
You are not asking from a legal point of view, just her appreciation?
MR. SIMS:
Right.
THE WITNESS:
Actually, I wasn't aware until I read it, your complaint. I thought it was for anybody, religious or nonreligious that could apply.
Q I didn't mean to imply that it wasn't only for religious people. But you were not aware of that until you read the complaint?

A No, because we are not a religious organization.
Q I understand. Do you intend to involve religious organizations in the delivery of the services under the grant?
A We intend to include anyone who is interested from the community of every town, city, whatever.
Q I direct your attention to page thirty-one.
[18] A Of which one?
Q I'm sorry, of the project summary, which is a list of the topics to be included in the program content of the Fertilities Appreciation for Families project. Would you explain the use of the phrase pollution of nature? What does that mean?
A Well, that we teach young adults just like it is so popular that nature should not be polluted, we teach them that their bodies should also not be polluted with chemicals or foreign objects. That, of course, includes drugs, alcohol, contraceptives, just everything that is on that list.
Q Is it your opinion that any foreign object, condoms, for example, pollute nature?
A Pollute the—
MR. WISE:
Is that her personal opinion or—
BY MR. SIMS:
Q Is it the point of view of the Families of the Americas Foundation? Well, excuse, me, is it the point of view of the [19] curriculum which you are undertaking to prepare under this grant that the use of artificial methods of birth control, such as condoms or diaphragms, are pollution of nature?
A No, really a pollution of their own bodies.
Q Of their own bodies?
A Yes.
Q Is it the point of view of the curriculum that sex outside of marriage is impermissible?

A It is harmful to their bodies.

MR. WISE:

Are you speaking about the grant or about—

MR. SIMS:

I'm speaking of the point of view of grant. They have a grant, it's undertaking activities, and I'm saying if there is a point of view behind the grant as it will be implemented in the real world.

BY MR. SIMS:

Q Is that true just of adolescents or just—

[20] A Could you repeat the question again?

Q Sure. Will the curriculum under the grant take a point of view with regard to sex outside of marriage?

A The grant very clearly defines that one of its purposes is preventive to teach parents to be the prime educators of their children, as it is their right, and to teach adolescents also the preventive measures of responsibility, discipline and the advantages of chastity before marriage, and that means the advantages that they have if they do not have premarital sex.

Q Does the curriculum take a position with regard to abortion?

A The curriculum will explain the disadvantages, the physical, social, psychological consequences of abortion.

Q All of which in the curriculum's point of view are disadvantages?

A It will give the true facts of abortion, the consequences, yes.

Q And in your judgment, those true facts are all negative?

[21] A Yes.

* * * * *

[38] Q On what is really the third page of this leaflet, although it is on the right-hand side of the second page that we have, there is a statement that says the [39] ovulation method fosters family life because it facilitates the evangelization of homes. Would you explain that, please?

A Which page is it?

Q Right over here. What does that mean?

A I guess bring the approach of the respect of the natural laws in the home.

Q On the second page, the ovulation method is for spouses who are striving—number six—to support other couples who are striving to proclaim God's kingdom.

A Other couples who are trying to, again, respect the natural laws which, in itself, would proclaim God's kingdom because God made the natural laws.

Q Looking on the right on page three again it says the ovulation method fosters family life because it helps realize the family is an integral part of the church. Which Church is that referring to?

A I already said the Catholic church.

Q In what way is the family an integral part of the church?

[40] A Because without families, there is no church.

Q I show you an article which appeared in the Wanderer and ask you if you are familiar with it?

Mark this an exhibit.

A Yes.

(Whereupon, the above-mentioned exhibit was marked for Identification.)

Q I take it it is a reflection of an interview you gave to a reporter for the Wanderer?

A Uh-huh, over the phone.

Q Do you know whether it accurately reflects what you told him during the interview?

A From what I can remember, I—

Q Her, excuse me, the reporter is Peggy Mullin.

A From what I remember, it seems accurate.

Q When was the interview conducted?

A It says—

Q It was published in August, around that period?

[41] A Probably a few weeks before, I don't remember.

Q Last summer sometime?

A Yes.

Q Does the Families of the Americas Foundation do any lobbying?

A In which regard?

Q Do you contact Senators or Congressmen concerning any political issues?

MR. WILSON:

Let me be sure I understand the question. I'm not sure that contacting political personalities is the same as lobbying. Can you clarify that?

BY MR. SIMS:

Q Does the Families of the Americas Foundation have discussions with Senators or Congressmen in Washington in an attempt to influence governmental policy?

A Yes, I have contacted them.

Q Has the Foundation attempted to have the Congress cut financial aid off to certain kinds of family planning?

A Has the Foundation what?

Q Attempted to get Congress to cut [42] off financial aid to certain methods of family planning?

A Would you rephrase the question?

Q Yes, has the Foundation attempted to persuade the Congress or the administration to cut off financial aid for certain methods of family planning?

A Our foundation has tried to obtain funds for natural family planning, if that answers your question.

Q The question is apart from seeking your own funds to use natural family planning, it's whether you have also urged the cutting off of other methods?

A We have urged them to discontinue the promotion of methods which are contrary to the culture and religion of other cultures and countries around the world.

Q The interview states we are hoping to persuade Washington that politically it is harmful to promote methods that are against a culture and a religion.

Who does that we refer to?

A Families of the Americas.

Exhibit 4

I – Why the Ovulation Method – Billings

The O.M. is. . .

1. . . . more than simply a method – it's a way of life
2. . . . more than a correct regulation of births – it is a vision of the family
3. . . . more than the mere observance of the 6th commandment. --

It is respect for premarital and conjugal chastity

* * * * *

II – THE OVULATION METHOD IS FOR SPOUSES WHO ARE STRIVING

1) to deepen the mystery of their mutual love
2) to free themselves from the slavery of the senses
3) to transform their married life into testimony
4) to cultivate their matrimonial spirtuality
5) to make themselves better instruments in God's plan
6) to support other couples who are striving to proclaim God's kingdom

* * * * *

III – THE O.M. FOSTERS FAMILY LIFE BECAUSE:

1) it facilitates the evangelization of homes
2) it promotes an authentic liberation
3) it increases marital harmony
4) it develops dialogue within the family
5) it opens the home to others
6) it awakens generosity among the members of the household
7) it helps realize that the family is an integral part of the Church.
8) it makes the family sensitive to the interests of the nation.

9) it shows that both man's and the family's calling are directed to the same common good.

10) it is the triumph of paschal love.

Exhibit 5

THE WANDERER
Asks. . .

Mercedes Wilson, Family of
The Americas Foundation

About . . .

THE DANGERS OF CONTRACEPTION
OVERPOPULATION MYTHS
THE BILLINGS OVULATION METHOD
TEACHING NFP IN THE THIRD WORLD
PRESENTING CHURCH TEACHING TO ADOLESCENTS

By Peggy Moen

* * * * *

Q. You sent to us a students' evaluation sheet and some information from a program on sexuality that you had at a Catholic high school in your area. What are you doing to expand this program?

A. We are in the process of doing videotapes to be able to provide this information to the parishes. We understand that parish priests are anxious to have Christian sexuality education to train parents to teach their own children at the time their own children are ready to receive it, rather than just letting the education be given at random by a teacher whom the parent does not have any control over, of what their personal views are. We want to have something in line with the wishes of the Holy Father in *Familiaris Consortio*, where he wants us to inform the young people of the truth and to tell them the advantages of chastity and virginity. And this is what our program is all about.

The young people are the most receptive to the truth. The way we teach it is not only the moral advantages and the moral aspect of Christian sex education, but we convince them that from the logical aspect it is their responsibility to look after their own bodies, that they are responsible to themselves and to society at large for their actions, that their body is a temple of the Holy Spirit and this is why the Church is protecting them not only spiritually, but also physically.

Q. In your recent trip to Rome, what words of encouragement did the Pope have for you?

A. I report to the Pope regularly, two, three times a year personally and by correspondence, several times more than that. In this last trip I was there 10 days before he went to Poland, and I had the privilege of seeing him briefly and presenting him . . . a report of what we have been doing the last few months. . . . He thanked me, thanked our organization, really, for the work we're doing, and (told us) to please continue.

Exhibit 8

Billings Ovulation Method
308 South Tyler Street
Covington, Louisiana 70433
504/892-4046

ADOLESCENT SEXUALITY PROGRAM

INTRODUCTION

This course has been designed to introduce adolescents to the concept of responsible sexual behavior and how this affects their lives now and during marriage.

* * * * *

Session 3

Understand in detail how artificial methods of contraception, abortifacients, male and female sterilization, and venereal diseases affect not only the individual human body, but also society as a whole (medical references provided);

Be aware of the different techniques used in the deliberate termination of human life through abortion (films and slides shown):

Have dialogue with the teacher concerning this information

* * * * *

Exhibit 12

CHRISTIAN SEXUALITY PROGRAM

Mercedes Wilson

The Christian Sexuality Program was prepared out of a response to the growing awareness of a tremendous need in our society for family involvement in sex education. Because of this need, Family of the Americas Foundation organized a Parent and Adolescent Program whose goal is to develop and disseminate an educational program based upon the teachings of the Catholic Church for which there is such a need today. The two-fold purpose of this program is to:

1. Assist parents to become more effective in providing sex education to their children, and;
2. Teach adolescents about their fertility, the importance of protecting their capability for procreation and encouraging them to accept responsibility for their sexual behavior.

The belief underlying the Parent and Adolescent Program is that sexuality should be dealt with in the wider context of love and marriage and should emphasize the teachings of the Church concerning the virtue of chastity. Children need to be taught how to grow into responsible and caring husbands and wives, mothers and fathers, and not just how to be satisfactory sex partners.

* * * * *

Exhibit 15

NATURAL METHODS OF FAMILY PLANNING

METHOD – BREAST FEEDING

WHAT IS IT? – Nursing the newborn at the breast.

HOW DOES IT WORK? – Tends to delay the return of ovulation.

HOW IS IT USED? – In one of three ways: 1) On demand of the baby; 2) On fixed schedule; 3) Breast and bottle

BY WHOM? – MOTHER

PROBLEMS – Breat feeding does not prevent the return of ovulation.

SECONDARY EFFECTS – Beneficial physical and psychological effects on mother and child. Best natural formula.

ADVANTAGES – Physical contact gives security and confidence to mother and baby.

MORALITY – Perfectly natural and good.

RECOMMENDED – Certainly

COMMENTARIES – Does not always assure sufficient time between pregnancies. Fertility can return in first months.

METHOD – RHYTHM

WHAT IS IT? – An old method of determining probable fertile time in regular cycles.

HOW DOES IT WORK? – Calculates the average length of past six cycles to guess probable fertile time.

HOW IS IT USED? – The couple abstain from sexual relations during estimated fertile times

BY WHOM? – THE COUPLE

PROBLEMS – Requires regular cycles; not useful for nursing mothers or at time of menopause. 76% maximum effectiveness.

SECONDARY EFFECTS – Fortifies the marriage. Promotes dialogue and responsibility.

METHOD – RHYTHM – Cont.

ADVANTAGES – Free, does not require medicines, devices or surgical interventions.

MORALITY – Perfectly Moral; Permitted and approved

RECOMMENDED – Yes, but not very effective

COMMENTARIES – Notable advances since the thirties when this was first promoted. Called Ogino-Knaus.

METHOD – TEMPERATURE

WHAT IS IT? – A method ????????? indicates exactly that ovulation has occurred ???? ree days ago.

HOW DOES IT WORK? – Basal bo?????????? temperature rises after ovulation. Women ????? emp. daily to note that change.

HOW IS IT USED? – If the couple wishes to avoid a pregnancy, they abstain from relations until after temp. rise has occurred.

BY WHOM? – THE COUPLE

PROBLEMS – Does not ????? ate preovulatory time nor the onset of fertile ????. Requires a thermometer.

SECONDARY EFFECTS – Same as ????????? mentioned for Ovulation and Sympto-????? methods.

ADVANTAGES – Is quite ???? reliable method of determining that ovulation has occurred.

MORALITY – Acceptable

RECOMMENDED – Yes, but commmonly used.

COMMENTARIES – This method discovered in the forties has been surpassed by the OM and S.T. Methods.

METHOD – OVULATION METHOD (BILLINGS)

WHAT IS IT? – A natural method that indicates fertile and infertile time in every cycle.

HOW DOES IT WORK? – The couple determines the fertile and infertile time of each cycle by observing the presence or absence of cervical mucus secretions.

METHOD – OVULATION METHOD (BILLINGS) – Cont.

HOW IS IT USED? – The couple identifies the fertile and infertile time and regulates their intercourse accordingly.

BY WHOM? – THE COUPLE

PROBLEMS – Requires maturity and responsibility, accurate observations and abstinence to avoid conceptions.

SECONDARY EFFECTS – Increases the capacity of dialogue. Requires and develops those same qualities that are necessary for a successful marriage, honesty, understanding, generosity, maturity. Increases the frequency and the pleasure of intercourse, fortifies the marriage.

ADVANTAGES – Can be used equally to achieve or to postpone a pregnancy. It is reversible at any moment. Avoids the dangerous and unnecessary use of drugs and or devices harmful to the woman's health.

MORALITY – Natural and Very Good.

RECOMMENDED – Certainly

COMMENTARIES – Easiest and most effective of natural methods. 98.2% effective/WHO report. Widely used thru-out world.

METHOD – SYMPTO-THERMIC

WHAT IS IT? – A method that combines various parameters of fertility including temp., rhythm, mucus, and other signs.

HOW DOES IT WORK? – Woman monitors as many signs as she prefers and informs her husband. She observes the natural signs that God and nature have placed in the woman.

HOW IS IT USED? – The couple identifies fertile and infertile times and plans intercourse accordingly.

BY WHOM? – THE COUPLE

PROBLEMS – Requires careful observations and the cooperation of the spouse. Charting is indispensable.

METHOD – SYMPTO-THERMIC – Cont.

SECONDARY EFFECTS – Increases the capacity of dialogue. Requires and develops those same qualities that are necessary for a successful marriage, honesty, understanding, generosity, maturity. Increases the frequency and the pleasure of intercourse, fortifies the marriage.

ADVANTAGES – Can be used equally to achieve or to postpone a pregnancy. It is reversible at any moment. Avoids the dangerous and unnecessary use of drugs and or devices harmful to the woman's health.

MORALITY – Natural and Very Good.

RECOMMENDED – Certainly

COMMENTARIES – Very widely used in developed nations. Less practical in developing countries.

ARTIFICIAL METHOD OF FAMILY PLANNING

METHOD – DOUCHE

WHAT IS IT? – A liquid medicated solution.

HOW DOES IT WORK? – Washes sperm out of the vagina.

HOW IS IT USED? – Douche immediately after sexual relations.

BY WHOM? – WOMAN

PROBLEMS – Not very effective. Fertilization may have already occurred.

SECONDARY EFFECTS – Contributes to vaginal infections.

ADVANTAGES – Few, if any.

MORALITY – Intent is that act be not open to life.

RECOMMENDED – No, as contraceptive.

COMMENTARIES – Eventually fails for most women. Not recommended ordinarily for feminine hygiene.

METHOD – WITHDRAWAL

WHAT IS IT? – Act of withdrawal before semen is expelled.

HOW DOES IT WORK? – Interruption of sexual act before ejaculation

HOW IS IT USED? – Deposit the semen outside the woman's body

BY WHOM? – MAN

PROBLEMS – Difficult to achieve, requires control; only 60% effective

SECONDARY EFFECTS – Often causes psychological problems . . . frustration, anxiety

ADVANTAGES – Does not cost any money.

MORALITY – This is onanism condemned in Old Testament.

RECOMMENDED – NEVER

COMMENTARIES – Ancient and widely used method, but not very effective.

METHOD – DIAPHRAGM

WHAT IS IT? – A rubber or a plastic cover of cervical opening

HOW DOES IT WORK? – Impedes entrance of sperm into uterus

HOW IS IT USED? – Placed in the vagina before coitus; used with spermicides

BY WHOM? – WOMAN

PROBLEMS – Irritations, infections, inconvenient

SECONDARY EFFECTS – Sometimes allergies

ADVANTAGES – No medicines needed except spermicides.

MORALITY – Contraceptive, Act is closed to life.

RECOMMENDED – NEVER

COMMENTARIES – Promotes infidelity and promiscuity. Equals mutual masterbation.

METHOD – CONDOM

WHAT IS IT? – Sheath of rubber or plastic to cover penis.

HOW DOES IT WORK? – Prevents the deposit of sperm in the vagina.

HOW IS IT USED? – Placed over the penis before relations.

BY WHOM? – MAN

PROBLEMS – Messy; Breakable; Unnatural

SECONDARY EFFECTS – Irritations; expensive and not always available.

ADVANTAGES – Can help prevent some infections.

MORALITY – Contraceptive. Act not open to life.

RECOMMENDED – NEVER

COMMENTARIES – Same as for diaphragm.

METHOD – IUD

WHAT IS IT? – Plastic device of various shapes; has strings of nylon may have copper or chemicals added.

HOW DOES IT WORK? – Prevents implantation of the baby in the uterus.

HOW IS IT USED? – Intra-Uterine-Device placed by a professional.

BY WHOM? – WOMAN

PROBLEMS – Sometimes falls out, or perforates uterus and intestines; may cause hemorrhage, infections.

SECONDARY EFFECTS – Cramps, ectopic pregnancies; problems of fertility; possible sterility ? PID.

ADVANTAGES – The cheapest artifical method.

MORALITY – Clearly abortive and repeatedly abortive.

RECOMMENDED – NEVER

COMMENTARIES – Sexually active woman may abort as a minimum three babies every 2 years.

METHOD – TUBUAL LIGATION

WHAT IS IT? – Cutting, burning or somehow closing of fallopian tubes.

HOW DOES IT WORK? – Prevents the ascent of sperm and descent of egg (ovum)

HOW IS IT USED? – Submitting to a surgical procedure, which can always be a risk.

BY WHOM? – WOMAN

PROBLEMS – Permanent, in practice irreversible. Increases chances of hysterectomy.

SECONDARY EFFECTS – ????opic pregnancies. Psychological problems: frigidity, remorse.

ADVANTAGES – Quickly done, often subsidized by governments.

MORALITY – THE DIRECT MULTILATION OF A HEALTHY ORGAN IS NEVER PERMITTED. END DOES NOT JUSTIFY MEANS.

RECOMMENDED – NEVER

COMMENTARIES – Does not increase sexual pleasure of couple nor solve problems.

METHOD – OPERATIONS VASECTOMY

WHAT IS IT? – Cutting each vas deferens

HOW DOES IT WORK? – Sperm cannot leave man's body normally.

HOW IS IT USED? – Surgeon cuts tubes which carry sperm from testes.

BY WHOM? – MAN

PROBLEMS – Mainly psychological

SECONDARY EFFECTS – Practically irreversible. Some kidney & vascular problems.

ADVANTAGES – Simple. Effective.

MORALITY – THE DIRECT MUTILATION OF A HEALTHY ORGAN IS NEVER PERMITTED. END DOES NOT JUSTIFY MEANS.

RECOMMENDED – NEVER

COMMENTARIES – Goal of many international agencies . . . sterilize 25% of fertile couples.

METHOD – ABORTION

WHAT IS IT? – Expelling fetus, surgically or by chemicals.

HOW DOES IT WORK? – Destroys baby before it is viable outside the mother's body.

HOW IS IT USED? – Submitting to a procedure which causes death of baby.

BY WHOM? – WOMAN

PROBLEMS – Kills baby and sometimes the mother. Remorse.

SECONDARY EFFECTS – May cause infections, subsequent spontaneous abortions, etc.

ADVANTAGES – Used as back-up when contraceptives fail.

MORALITY – This is pure homicide.

RECOMMENDED – NEVER

COMMENTARIES – Even where legal, only kills babies.

METHOD – "PILL"

WHAT IS IT? – A pill with artificial progesterone and estrogen

HOW DOES IT WORK? – Sometimes it is 1) Anovulatory, impedes ovulation and is sterilizing. 2) Makes certifical mucus more viscuous, and is contraceptive. 3) Impedes implantation in womb of newly conceived baby, and is thus abortive.

HOW IS IT USED? – The woman takes the pill every day according to instructions.

BY WHOM? – WOMAN

PROBLEMS – Many contra-indications. Makes 40% of healthy women ill, sometimes gravely

SECONDARY EFFECTS – Sometimes causes nausea, spotting, blood clots, increases changes of infertility and VD

ADVANTAGES – Puts all the burden and responsibility on the woman.

METHOD – "PILL" – Cont.

MORALITY – Sometimes sterilizing, sometimes contraceptive. Occasionally it may be abortive, and frequently makes healthy women sick.

RECOMMENDED – NEVER

COMMENTARIES – Prevents ovulation only about half of the time. This is due to the decreased dosage of the pill. Can cause problems of infertility or sterility, especially in the young women.

METHOD – INJECTIONS

WHAT IS IT? – A drug (Depo-provera) that acts like the pill, but is stronger and longer lasting

HOW DOES IT WORK? – Sometimes it is 1) Anovulatory, impedes ovulation and is sterilizing. 2) Makes certificial mucus more viscuous, and is contraceptive. 3) Impedes implantation in womb of newly conceived baby, and is thus abortive.

HOW IS IT USED? – The woman receives the injection every three months.

BY WHOM? – WOMAN

PROBLEMS – Very dangerous for sick or undernourished women; use is forbidden in many developed countries.

SECONDARY EFFECTS – Even more dangerous than the pill.

ADVANTAGES – Puts all the burden and responsibility on the woman.

MORALITY – Sometimes sterilizing, sometimes contraceptive. Occasionally it may be abortive, and frequently makes healthy women sick.

RECOMMENDED – NEVER

COMMENTARIES – Prevents ovulation only about half of the time. This is due to the decreased dosage of the pill. Can cause problems of infertility or sterility, especially in the young women.

METHOD—FOAMS, JELLIES, VAGINAL TABLETS

WHAT IS IT?—Usually contain chemicals which destroy sperm.

HOW DOES IT WORK?—Makes the vagina more acid than it should be, thus killing the sperm.

HOW IS IT USED?—Placed in the vagina before each act of intercourse.

BY WHOM?—WOMAN

PROBLEMS—Irritations, allergic reactions; alters pH of the vagina.

SECONDARY EFFECTS—The women is more prone to vaginal infections.

ADVANTAGES—Highly lubricative.

MORALITY—Contraceptive. Sexual act is not open to the possibility of life.

RECOMMENDED—NEVER

COMMENTARIES—Studies suggest these may cause birth defects.

Deposition Excerpts of
Nancy Bouchard-Finke,
Director, Family Life Services Department,
St. Margaret's Hospital for Women

[Direct Examination by Ms. Benshoof:]

[16] Q Is this the curriculum you said you saw for the first time in December 1983?

A That is correct.

Q Is this the curriculum used in public schools or parochial schools?

A Public schools.

Q When you sent this letter to HHS, were you aware that a different curriculum was used from parochial schools?

A Yes.

Q How come that letter, that curriculum was not also sent to HHS?

A Because it wasn't related to the Adolescent Family Life grant.

Q What do you mean, it wasn't related to it?

A The Adolescent Family Life grant curriculum outline that was outlined in the original grant application, this was the curriculum that was developed in response to that outline.

Q But, another curriculum was used when family life educators went to the parochial schools, is that correct?

A The same curriculum with added information, additional information.

Q Some of the people who taught that added curriculum or the parochial school curriculum were paid under Adolescent Family Life funds, is that correct?

[18] A Yes.

Q Since they were being paid under Adolescent Family Life Act funds and using a curriculum other than the one you sent to HHS, didn't you feel that HHS also had to see the curriculum developed, the second curriculum developed for parochial schools?

A I had shared with HHS that when I became aware that there were two curriculums, that there was another curriculum.

Q When did you become aware that there were two curriculums?

A In December of '83.

* * * * *

[23] Q You stated that you first became aware of the existence of two curriculums in December 1983; did you have any discussions with Mary Conroy about why there were two curriculums?

A Yes.

Q When did you first have a discussion with her?

A After the meeting, that I found out there were two curriculums, sometime in December.

Q Could you describe the substance of your conversation with her about this?

A Yes. I shared with her that I was surprised that there were two curriculums, that I was unaware that I—my understanding of what the outline in the grant was was the, you know, that she was, I knew she was working on the curriculum and was [24] surprised that there were two produced instead of one.

Q Did she tell you why two were produced?

A Yes.

Q What did she say?

A That back in, I can't remember the dates, but sometime in 1960 or early '70s, I guess when she started going out into the schools, she had started developing an outline, and so when she converted the outlines into curriculums, she created the one that she had traditionally used before the grant funding came along, and then also developed the one that the grant funded.

Q When you say she created the one she had traditionally used, do you mean the one containing religious teachings?

A Yes.

Q So, that was the one traditionally used in the Family Life Education program?

A Right, before there were grant funds, state or federal.

[27] Q Did you have any discussion with her as to whether she should continue using two different curriculums?

A No—after 1983?

Q Yes.

A I am trying to think; from December to March is sort of a blur. I think we talked about what went on in the, you know, when she taught the curriculum and she basically was teaching the curriculum, from my understanding she was teaching the curriculum that was in the grant application, and when questions came up in the Catholic schools that pertained to Catholic issues, she responded to those questions. That's my understanding of what went on.

Q But, the curriculum—by that word I am using, I mean the physical curriculum?

A Yes.

Q —used in the Catholic schools did contain those teachings?

[28] A Yes.

Q On the pages as an integral part of the curriculum, isn't that correct?

A That is correct.

Q In December 1983, did she state to you whether or not she was going to continue using that Catholic curriculum in the parochial schools?

A That statement was never made.

Q Did she make any statement as to whether or not they could continue teaching in the parochial schools without a Catholic school curriculum?

A Could you ask that question again, please?

MS. BENSHOOF: Read it back to her.

(The stenographer read back the pending question.)

A I don't recall that statement being made.

Q At this point, that is, December 1983, were you the person at St. Margaret's responsible for reporting to HHS?

A Yes.

Q Did you report to them the fact that there were two curriculums once you found that out?

A Yes.

Q Who did you report to?

[29] A Barbara Rosengard.

Q Did you call her specifically with this information?

A Yes.

Q Do you remember when you called her?

A No, some time probably, probably it was after the first of the year, in January or February.

Q What did you tell her?

A That I had learned that there were two curriculums, one that she had been sent and one that, another curriculum.

Q What did you say about this other curriculum when you called her?

A Just that it existed and that it had, it was different, that the difference between the one that I had sent her.

Q Did you tell her that these differences were religious differences?

A I didn't use the word religious, I just told her that they were some teachings on abortion and I don't even recall what the other difference is, but that was it.

Q When you say teachings, those are religious teachings, isn't that correct?

[30] A Well, just information on abortion.

Q Both curriculums have information on abortion?

A Right.

Q How did you characterize the differences when you talked to Barbara Rosengard?

A I said that they were the Catholic Church's teachings.

Q What did Barbara Rosengard say to you about this?

A She wanted to know how they were used and she was very concerned as I was.

Q When she asked you how they were used, what did you say?

A I explained to her that it was my understanding that when the program was out in public schools, that they did not teach the church's doctrine or, you know, they used the regular, the grant curriculum.

Q About what percent of the Family Life Education Program took place in public school

A I don't really know; a smaller percentage than in parochial schools.

Q Was Barbara Rosengard aware that that overwhelming number of schools in the program were parochial schools?

[31] A She was aware that there were more parochial schools, that they were in more parochial schools than public schools.

Q This letter identified as Exhibit 2 is dated January 11th, 1984. Did you speak to Barbara Rosengard before you sent this letter?

A I don't recall the time when I spoke to her.

Q This letter says that you enclose the curriculum, and this is the public school curriculum, isnt that correct?

A Yes.

Q Did you ever furnish HHS with a copy of the Catholic school curriculum?

A I did not.

Q Do you know whether or not one was furnished?

A It is my understanding that they do have a copy of it.

Q But, you are not personally aware of how they got a copy or when?

A No.

* * * * *

[38] Q Who are the people who administered the pregnancy test to adolescents who came into the Family Life Education Department, I mean, Family Life Department for pregnancy tests?

A The nurse, the adolescent nurse.

Q Who was that?

A Currently?

Q When you were there?

A There are two; Jane Stallard, and then when she left she was replaced by Nancy Elmeer.

Q Could you give their dates, approximately?

A Jane was there when I got there, I don't know when she came on, and she left in the summer, I would say June of '83, June or July of '83. And, Nancy Elmeer was hired after she left, so somewhere from July or August '83 to—she is still there.

[39] Q Did you hire Nancy Elmeer?

A Yes, I did.

Q When you hired her, did you describe what her job would be?

A Yes.

Q What did you tell her her job would be in relationship to discussing options with the patient once the pregnancy tests came back?

A That if the pregnancy tests came back negative, we would offer our services on fertility awareness and natural family planning if the girl wanted to enroll in the course and if it was positive we would tell her that these options that we had at St. Margaret's would, you know, the services, I should say, that we had at St. Margaret's which would be to the prenatal clinic, the alternative school, the residence, and if that was not what she chose to do, that, you know, that we didn't have any other services that she could avail herself of.

Q You stated that if the pregnancy test were negative, she would be offered natural family planning?

A Or fertility awareness, yes.

[40] Q What is fertility awareness?

A I think it is the same thing.

Q As natural family planning?

A I am not sure, but I think it is.

Q Why wouldn't you offer other methods of birth control?

A Because it is not allowed at the hospital.

Q Why isn't it allowed?

A Because it is in conflict with the teachings of the Catholic Church.

Q What if a girl wanted other methods, if she got a negative pregnancy test and she wanted another method of birth control, what would she be told?

A She would be told that we didn't have those services available, that we did have natural family planning if she would like that.

Q Would she be referred elsewhere for other methods?

A No.

Q Do you know how many teen-agers actually availed themselves of the natural family planning option?

A No, I really don't.

Q Are you familiar with the success rates of teen-agers using natural family planning as a birth control method?

[41] A No.

Q If the pregnancy test were positive?

A Yes.

Q What was the policy in your department of informing the girl of the option of abortion?

A We did not inform them of that, the girls obviously knew what their options were.

Q If they would ask for an abortion referral, what would you do?

A We would tell them that we were not allowed to make referrals.

Q Why?

A Because it was not in agreement with the teachings, with the hospital philosophy.

Q Which was what?

A Which was that we do not provide the service of abortion at the hospital or make referrals.

Q Because why?

A For two reasons; one, it was not in accordance with the teachings of the Catholic Church, and, two, it is against the grant

Q When you hired the new nurse during your tenure as director –

A Nancy?

[42] Q –did you inform the nurse that this would be a restriction of –

A Yes.

Q –or whatever on her job?

A Yes.

Q What did she say to you?

A That she could live with that.

Q Did you interview any other people for the job who felt they could not live with that?

A Yes.

Q How many?

A I'd say we had seven candidates; maybe two.

Q What did they say to you?

A That they didn't want to work with that restriction.

Q Did they give a reason?

A Because it was against, they didn't believe in that restriction.

* * * * *

[54] Q You were aware, however from the list of schools given in the grant proposal, that the Family Life Education Programs were taking place in CCD classes, isn't that correct?

A It was my understanding that some of the classes were in CCD classes.

Q Do you know what CCD stands for?

A Not exactly. I know what it is, but –

[55] Q What is it?

A It is for the meetings of youth in the Catholic Church.

Q When you say the meetings, what sort of meetings, religious meetings?

A Yes, the instruction, I guess, in Catholic systems of life, family life issues.

Q Did it concern you that some of your programs took place in these religious instruction classes.

A No.

Deposition Excerpts of
Mary Conroy,
Director of Family Life Education,
St. Margaret's Hospital for Women

[Direct Examination by Ms. Benshoof:]

[90] Q Two curriculums were produced this morning entitled "Family Life Education Department, St. Margaret's Hospital for Women, Family Life—Human Sexuality, Curriculum for Grades K through 12" and "Family Life Education Department, St. Margaret's Hospital for Women, Curriculum, Grades K through 12, APH dash 000 dash 711 dash 01 dash 0."

Are these two curriculums the same?

(Witness examined documents).

A No. The curriculum itself is not the same. The context of the matter is the same. The difference is that this curriculum actually—

Q When you are discussing this curriculum [91] could you refer to the curriculum with the grant number or not the grant number?

A The curriculum without the grant number, this curriculum has actually or was actually started back in 1978 and has been changed, revised, updated and added to. It was started by myself as the Director of Family Life Education. I saw the need to both improve it, change it, revise it and also to lower the curriculum to Grade K.

Q Now you are referring to the curriculum without the grant number?

A Without the grant number.

Q So during the time period was that used as the curriculum?

A This has always been the curriculum from Grades 7 through 12. The additional component, being K through 6, was added since 1982.

Q So it is still in use during the two-week training session that you use for your health educators?

A Correct.

Q Could you now explain why the other curriculum—strike that.

Could you explain how the other [92] curriculum is different?

A The other curriculum is only different in that it does not present the philosophy of the church on certain issues. Every other bit of content is the same, the only thing being that there is no philosophy of the church.

Q What do you mean by "philosophy of the church"?

A The church's teaching on contraception and/or abortion.

* * * * *

[94] Q Are both these curriculums used in training your health educators?

A They are both the same curriculums.

Q You have stated that there is a certain difference between the two curriculums. One has [95] the church philosophy and abortion and contraception removed.

Which curriculum is used in training your health educators?

A I would say both curriculums.

Q Do you use both simultaneously? Do you use both simultaneously?

A Yes.

Q When a health educator comes into your training program are they given copies of each of the training programs?

A Yes.

Q What explanation do you give them as to why they are receiving two curriculums?

A I explain about the federal grant. I also explain that when we are in a public school setting we do not present the teachings of the church.

Q Mary, you stated that 12,400 students have received these courses. Over what time period are you talking about?

A A one-year period.

Q And what year period is that?

A If I am correct it's the fiscal year of [96] October 1 through September 30, 1982—October 1, 1982 through September—

Q —1, 1983?

A Right.

Q How many schools were these programs put on in?

A I can't give you the exact number offhand. It was approximately 80 to over a hundred schools.

Q How many of these schools were public schools and how many parochial schools?

A Approximately—I am not sure. I would have to really look at my records.

I would say we did about six public schools and the rest would be private or parochial schools or parishes.

Q When you say "or parishes" what do you mean?

A They don't all have a school. They may have religious ed classes or youth organizations and they would be considered. So we would be doing it for that agency or that group in that parish.

Q Right.

[97] When you put on a program in the parish what physical facility do you use?

A It can range anywhere from a classroom to a hall to rented space which the parish would have available to them or donated space.

Q When you talk about a classroom or a hall, a classroom or a hall in the church?

A It could be in the church or the parish or the agency.

Q Have some of these been put on physically in the church and parishes?

A Yes.

* * * * *

[108] Q When these classes are taught in the parochial schools and when they are taught in the primary grades

does the regular teacher stay in the class along with the health educator from your program?

A No. The only grade we allow a teacher present is in kindergarten or first grade and that's only usually early in the school year when the children really have some anxious moments about a stranger coming in.

Q So that for the grades above 7-years old the health educator is the only teacher in the classroom?

A Correct.

Q Are there any other adults in the classroom?

A No.

Q And these are the regular parochial school classrooms; is that correct?

A Correct.

Q This is the same room that their other courses generally take place in?

A Correct.

* * * * *

[120] Q Mary, without the writing on it just explain to me what you meant by Box A under Roman numeral III.

A. I think I already have.

MR. ROGERS: Go ahead.

A I will explain it again.

When I talk about respect for the body I talk about the care, the respect that they need in caring for themselves, teaching them about their own body at a Grade 1 level.

Q Why is the word "God" there?

A Why is the word "God" there? I think of God as creating all.

Q Is this same outline used as an outline curriculum for all parochial schools?

A Yes.

Q Is a different outline used in public schools?

A "God" would be omitted from the curriculum.

Q In the public schools?

[121] A In the public schools.

Q Who fills these out?
A The teachers giving the presentations.
Q You mean the health educators?
A The health educators.
Q Employed by you?
A Right.
Q Who reads these forms?
A What do you mean?
MR. ROGERS: After they are completed?
MS. BENSHOOF: After they are completed.
A I do.
Q Why?
A As a supervisor and as the department head.

* * * * *

[123] Q Have you ever taught using this outline?
A Yes.
Q When you taught using this outline what did you teach under Roman numeral III, Grade 7?
A Roman numeral III?
Q II D. Wait now. Grade 7, Roman numeral II, Subsection D.
A For Grade 7 in a parochial Catholic school setting I would tell them that we get our values from our Christian beliefs and from our parents. We do not teach values. They learn their values through their parenting or through their parents.
Q So you taught the Christian values came solely from their parents?
A And their schooling, their religious education if they have it.
Q It states here "Seeking Christian [124] values and goals." Could you explain a little further what you meant by "Seeking Christian values and goals"?
A What I mean by "Seeking Christian values and goals" is they should communicate with their parents:

what are their goals; what are their beliefs; what are their parents' values.
Q So that you are presenting as a positive promotion to the seventh graders that they should seek Christian values and goals from their parents?
A Exactly.

* * * * *

[168] Q Why in the curriculum explaining abortion are no positive psychological effects [169] listed?
A I guess it's because I do not feel there are any positive psychological effects for abortion.
Q What is the basis for your opinion?
A Personal.
Q So you did not review any particular psychological studies in writing that section?
A Over the years I have read many sections. I have never been led to change my views because of studies that have been done.
Q You also stated on the third page of the abortion section, "Are there any absolute indications for performing an abortion?" Then you state, "Medical—No."
Are you aware that particularly for teenagers abortion may be more medically safe than continued pregnancy and childbearing?
A I would have to have that documented and I would have to study the reports on that, the studies.

* * * * *

[176] Q I would like to read you another statement: Quote, "In fact women with psychiatric problems are more likely to suffer from an abortion than benefit from it. Also no severe psychiatric consequences from carrying a pregnancy to term due to rape."
Where did you get the basis for those two statements?
A I will get that for you. I don't have it.
MR. ROGERS: If you have it.

A I have it back in the office. I can document that those have been studied.

Q Do you know the names of the studies, the articles, the books, the authorities?

A No, I don't know it. I will get it. I do not have it.

* * * * *

[179] Q Is the abortion section in the parochial school curriculum different from this abortion section in the public school curriculum?

A It's the same content with the additional component or additional statement that the church, the Catholic church, does not approve of abortion in the teaching of the Catholic church.

Q Do you, yourself, and your health educators explain why?

MR. ROGERS: Why what?

MS. BENSHOOF: Why the Catholic church does not believe in abortion.

A In the Catholic school system we would, yes.

Q What do you say?

A The teaching of the church. We will tell them the teaching of the church and we—

Q What is that?

A That they do not approve of abortion.

Q Why?

A They consider you are taking a life. We also see life beginning at conception.

[Cross Examination by Mr. Hirt:]

* * * * *

[187] Q Okay. I think it was your testimony that if it's to be given in a parochial school, for instance, you would tell them there would be the segment on abortion, the church's teaching on abortion; is that correct?

A Correct. If we are going to be presenting the high school curriculum, yes.

EXHIBIT 6

St. Margaret's Curriculum

E. Seeking Christian Values and Goals

Adolescents ask why do they have sexual urges/desires for the opposite sex as they begin to mature. This is normal part of adolescence for both girls and boys. This is the plan of nature for the continuation of life. There is nothing wrong with feelings, but it is what one does with them that counts. You don't act on all the emotions/feelings you have. For example you may know how to drive a car, see a nice Trans Am that you like very much, but if you steal it you realize that you have to accept the responsibility for that act.

Your body is physically maturing, but now is not the time to use that gift of fertility, as emotionally and intellectually you still have a lot of growing to do. Adolescence is a time of awakening, learning to respect the fertility of both man and woman, and that each deserves a certain dignity. It is a long period of time to learn about controlling feelings.

You receive many messsages from your family, friends, peers, society, and the media which influence your ideas and values about sexuality. It is important to seek factual, honest, and helpful information about sexuality that goes along with your values and that will help you develop into a mature, loving, Christian man/woman, with the ability to care for yourself as well as others.

We have been talking about you, the person, as being much more than just the outside, physical layer that we all can see. Who is the mirror that tells you what you are really like? That's right—your friends! They can tell what you are feeling simply by the way you act or react. Many times

people try to be like their friends and do not always appreciate how special and unique they are themselves. Can anyone tell me what unique means? (Write UNIQUE on the board and elicit response from the students: one-of-a-kind, original, special, etc.

When you were a small child, perhaps the first day you went to Kindergarten, you brought home a drawing for your parents. They were so proud and made you feel very special. They may have even placed it on the refrigerator door for everyone to see. As you got a little older perhaps you joined a baseball team and when you hit the ball for the first time everyone praised you and told you that you would be the greatest baseball player.

Sometimes, as you reach adolescence, you may wonder—What is so special about me? What talents do I have? You may think more about the things you can't do rather than learn to appreciate the abilities that you possess.

We will now do an activity in which we will can on each student, in turn, to finish the following statement: I AM UNIQUE BECAUSE I CAN . . .

> Activity: Teacher will write statement on board and list the students' responses.
>
> Discusssion with group to help student develop an awareness that he/she is unique and possesses talents and dreams of his/her own. You do not have to be like everyone else.

Was this a difficult activity for some of you? Why? (Response from students may include: "I couldn't think of anything; I felt like I was bragging; maybe other people will think I am different.") Sometimes it is hard for us to express how we feel about ourselves. Notice that when you couldn't think of anything to say, your classmates had noticed positive qualities about you.

This is the time of your life to stop and think about yourself and appreciate the fact that there is no one just like you; no one that possesses the same talents and abilities

in the same way that you do. Some of you may be great athletes or students, while others may possess different qualities. Each one of us has a mark on his/her body which is a sign of their uniqueness. Can you think what it is? That's right—your fingerprints? Sometimes when you wonder about just how special you are—take a look at your hand and realize that there never was, or ever will be someone just like you!

As you mature, learn to appreciate and develop the talents and abilities that you have.

F. Love

> Understanding love can be as complicated as traveling to the moon. The fact that man has already explored the moon may make that an easier task than to come up with a definition of love. Poetry, songs, literature, and films have tried to describe love in an endless variety of ways. Generally it is described as being a sudden, thrilling thing that hits you between the eyes, or on the head. Often teenagers, and even pre-teenagers, tend to be "in love with love". But any serious discussion about love leads to the conclusion that there are many kinds:
>
> 1) Conditional Love
>
> > It is important to love. You must love yourself before you can learn to love another. You can only give away what you have. What are some ways people "use" friendships? (Elicit response from group.) Examples: You received a video game for Christmas and all of your "friends" want to come over; you have a pool and during the summer certain "friends" drop by; your brother got his driver's license and has instant "friends"; you are being the person that someone wants you to be, not your own self. These are all examples of conditional love—love with strings attached. How you learn love, then, will be determined by the culture in which you grow.

2) Unconditional Love

In order to love you have to know the total person of the other. Growing into love is a gradual process that demands trust and honor. Unconditional love is other centered – wishing only what is best for the other person. Loving that person with his/her faults as well as their good points. What would be an example of this type of love? That's right – parental love. They love the child for simply being who he is. Where do we learn about love? If you want to learn to love, then you must start the process of finding out what it is, what qualities make up a loving person, and how these are developed. Each person has the potential for love. Love is learned best in wonder, in joy, in peace, in living. One grows in love. The more he learns, the more his opportunities to change his behavioral responses, and thus, expand his ability to love.

3) Christian Love

"The Church, a prophetic, priestly and kingly people, is endowed with the mission of bringing all human beings to accept the word of God in faith, to celebrate and profess it in the sacraments and in prayer, and to give expression to it in the concrete realities of life in accordance with the gift and new commandment of love.

The law of Christian life is to be found not in a written code, but in the personal action of the Holy Spirit who inspires and guides the Christian. It is the 'law of the Spirit of life in Christ Jesus: God's love has been poured into our hearts through the Holy Spirit who has been given to us.'

Inspired and sustained by the new commandment of love, the Christian family welcomes, respects and serves every human being, considering each one in his or her dignity as a person and as a child of God.

Love, too, goes beyond our brothers and sisters of the same faith since 'everybody is my brother or sister'. In each individual, especially in the poor, the weak, and those who suffer or are unjustly treated, love knows how to discover the face of Christ, and discover a fellow human being to be loved and served." (Pope John Paul II, "The Role of the Christian Family in the Modern World", pp. 92-94.)

Take the time now to appreciate that you are a person of worth, with certain values, possessing abilities and talents that will enable you to care and share your love with others.

(Boys and Girls Separate)

III. HUMAN GROWTH AND DEVELOPMENT

Objectives: 1) To assist the student in appreciating that the age of puberty varies with each individual and to understand the changes that will be taking place.

To assist the student in understanding the anatomy and physiology of the male and female reproductive systems.

A. Pre Test

B. Special Phase of Physical Growth – Time and Length Varies

It is at this time of your life that you are beginning to be aware of your sexuality, a gift

beginning to be aware of your sexuality, a gift to be appreciated and understood. What do we call this time of life? What does puberty mean? It is a Latin word for the age of

* * * * *

Complications and/or Side Effects

- Allergic reaction to diaphragm and/or spermicide
- Pelvic Pain
- Cramps
- Urinary Retention
- Recent reports show the association of spermicides to the future development of congenital abnormalities.
- Toxic Shock

Effectiveness

About 97% effective if used correctly, and consistently, but much less effective if used carelessly. (H.E.W. Statistics, 1976)

4) STERILIZATION—The two major forms of sterilization are occlusive procedures either for the Fallopian Tubes in the Female or the Vas Deferens in the Male.

Mechanism of Action

TUBAL LIGATION in the Female—ligation of the fallopian tubes prevents the eggs from passing through the tubes.

VASECTOMY in the Male—ligation of the vas deferens, the major duct which carries sperm from the testes to the outside of the body.

Complications and/or Side Effects

Risk of surgical procedures.

Effectiveness

Almost 100% effective and not usually reversible. (H.E.W. Statistics, 1976)

The Church's Teaching on Artificial Contraception

1) The Church condemns direct sterilization and contraception:
   - Because it deliberately frustrates the natural power of conjugal acts to generate life, is a grave sin and is intrinsically evil. (Pius XI—Casti Connubii)
   - Every action which renders procreation impossible is to be excluded; and directly intended sterilization is an intrinsic disorder unworthy of the human person. (Paul VI—Humanae Vitae)
2) The Church permits indirect sterilization in some cases (Humanae Vitae, Pius XII)
   - Sterilization is possible when generative organs are diseased, or continued presence of normal functioning exacerbates diseased condition of another organ. (Example: ovaries can be removed in women with the kind of breast cancer which is stimulated by the presence of estrogen.)
   - Sterilization is not possible when future pregnancy threatens a woman because that danger arises only after voluntary sexual intercourse results in a pregnancy.
   - With regard to the principle of totality, Pope Pius XII taught that every organ must cede to the good of the whole, but certain conditions need to be verified. These are:
     - continued presence of pathology or injury causing serious damage and threat.
     - damage or threat lessened by the proposed surgery or amputation.
     - positive effects which outweigh the negative.
3) The Church permits Natural Family Planning
   - It is morally licit under certain conditions to desire that a child not be conceived.

– It is permissable for married couples to engage in sexual intercourse only during the sterile period of the menstrual cycle.
– It is licit to make use of the natural rhythms of the menstrual cycle, but serious motives are required.

(Pius XI, Pius XII, Paul VI)

* * * * *

Prostaglandins (hormone-like substances) or Hypertonic (concentrated) Salt Solution is injected into the womb. Both substances cause the womb to contract, causing the fetus to be born before it can survive outside the womb. Saline, in addition, scalds the fetus' skin and causes an electrolyte imbalance: usually the fetus dies in the womb.

DILATION AND EVACUATION ("D & E")– This procedure is similar to a D & C. The cervix is dilated with dilators or with dried stems of the seaweed, Luminaria. A special instrument called "Ovum Forceps" is used to strip the fetus and membranes from the uterine wall: large parts, such as the head and chest, are crushed with the instrument.

3) Third Trimester Abortions:

INSTILLATION ABORTIONS – (same as in Second Trimester Abortions)

HYSTEROTOMY – An abdominal operation, using the same surgical techniques as for a Caesarian Section Delivery, but no attempt is made to resuscitate the baby.

NOTE: Occasionally, babies from Installation and Hysterotomy procedures may be born alive.

4) Legal Requirements in Massachusetts:

For adults and emancipated minors there are NO restrictions. Minors (under 18) must have permis-

sion of a parent, or if the parent is unwilling, they can partition the court. There is no limit, in any case, at which stage of pregnancy the abortion is done.

Complications of Induced Abortions

1) Medical

IMMEDIATE COMPLICATIONS include death, retained fetal parts (causing hemorrhage and/or infection), tear or perforation of the uterus with hemorrhage and/or infection, prolonged bleeding, urinary tract and pelvic infections, cervical damage, scar tissue in the uterus, and endometriosis. Occasionally, abdonimal operations are necessary to repair uterine or intestinal perforations. On an average, ten percent of women who have abortions suffer some kind of complication; one percent suffer a serious complication.

DELAYED COMPLICATIONS occur especially in women who have had more than one abortion – these include failure to carry subsequent pregnancies to term (miscarriages and premature birth) and infertility.

2) Psychological

Both Immediate and Delayed, these complications include recurrent anxiety reactions, sever guilt feelings and depression.

Are there any absolute indications for performing an aborttion?

Medical – NO! Due to modern medical advances, even patients with severe heart, kidney or lung diseases or diabetes can be carried to term. Admittedly, in some cases it would be wiser to avoid getting pregnant: hence, responsible use of sexuality should be encouraged.

NOTE: Even very young girls can be carried to term safely if they receive good prenatal care. No genetic disease of the fetus would endanger the life of the mother.

Psychological—NO absolute indication either. In fact, women with psychiatric problems are more likely to suffer from an abortion than benefit from it. Also, no severe psychiatric consequences from carrying a pregnancy to term due to rape.

The Church's Teaching on Abortion

No reason, medical, economic, or social can morally justify a deliberate and direct attack on the life of an innocent human being regardless of age, mental or physical condition, or social status.

"Life must be protected with the utmost care from the moment of conception: abortion and infanticide are abominable crimes." (2nd Vatican Council—Gaudium et Spes #5)

Exhibit 9

St. Agatha School—440 Adams Street
Milton, Massachusetts 02186—Telephone 696-3548

October 14, 1982

Mrs. Mary Conroy R.N.
St. Margaret's Hospital
Cushing Street, Dorchester, Ma. 02124

Dear Mrs. Conroy:

It is with a deep sense of sincerity that I write to express the gratitude of the faculty and parents of St. Agatha's School for your presentation of the Family Life Program.

The parents were both enthused and happy that this type program was being made available to their children. The response was one hundred percent and all the students participated in the program. The students were very pleased and I know that the parents were happy also to know that this much needed information was being presented in a Christian atmosphere, and the focus of sexuality was shifted to the total person in Christ.

* * * * *

The results may not be evident tomorrow, or even next year, but hopefully in the years to come, these students will be better adjusted persons because they were given understanding and support to explore their own needs, as they travel life's highway with God, as their co-pilot!

May God continue to bless you and the work you are doing for others.

Sincerely in Christ,
/s/ SR. M. JOANICE
Sr. M. Joanice, C.S.J.
Principal

N.B. Enclosed is a check for $250.00 for the continuation of this worthwhile project, through the kindness of our Pastor, Rev. F.X. Turke.

Exhibit 14

December 28, 1983

Dear Parent/Student:

St. Mary's High School CCD program will alter its format in January and February in order to present a program entitled "Family Life and Human Sexuality" to all students in grades 9 to 12. This program will be presented by the Family Life Education Department at St. Margaret's Hospital in Dorchester. The department, headed by Mrs. Mary Conroy, R.N., has been conducting similar programs throughout the Archdiocese, both in CCD programs and in the parochial schools.

The importance of providing sex education to our youth was highlighted only three weeks ago by Pope John Paul and the Bishops.

* * * * *

I can not over emphasize the importance of this program.

Sincerely Yours in Christ,

Msgr. Charles Dewey

Exhibit 15

FILMSTRIPS – SEX EDUCATION SERIES – 7

A Complete Curriculum of Gospel Oriented Materials Field Tested and Certified by Authorities:

This series is a unique approach to sex education, thoroughly modern, based on the Gospels. Materials are graded for use from early childhood through adulthood. The questions most frequently asked at each age level are answered with dignity and accuracy. Human sexuality is treated in the total context of Gods plan for manking.

I WONDER, I WONDER (Ages 5-8)

A delightful and instructive story about two small children whose mother has given birth to twins. Dad, mom and the grandparents help supply answers to the childrens many questions.

WONDERFULLY MADE (Ages 9-11)

Speaks directly to Christian preteens emphasizing the wonders of Gods continuing creative activity. Helps preadolescents understand and anticipate physical and emotional changes that accompany maturity. Glossary and bibliography included.

TAKE THE HIGH ROAD (Ages 12-14)

Encourages young teens to make the most of adolescent years. Helps them move toward successful manhood and womanhood. Includes glossary and bibliography.

LIFE CAN BE SEXUAL (Ages 15 and up)

Shows how sex, sexuality and Christianity interrelate, and speaks frankly and helpfully of the issues that teenagers face.

PARENTS GUIDE TO CHRISTIAN CONVERSATION ABOUT SEX

A handbook to help Christian parents provide sound sex education for their children.

CHRISTIAN VIEW OF SEX EDUCATION:
Shows the churches responsibilities and opportunities in sex education and suggests approaches and programs.

FILMSTRIPS—6

GRADE 4 *LIVING GODS WORD.*

1. Introduction to (Living Gods Word) for Parents & Catechists.
2. The Beatitudes: Happy Ways to live.
3. The Mass: We celebrate the Lords Day.
4. The Sacrament of Reconcilliation: We celebrate Gods Mercy.
5. The Ten Commandments: Growing up in Gods family.
6. We honor Mary, the Mother of God.

GRADE 5

1. Introduction for Parents and Catechists.
2. Sacraments of initiation: Belonging to the Christian Community.
4. The Works of Mercy: Growing in a Christian Community.
5. The Church Year. We celebrate the Life of Jesus.
6. The Eucharist: We celebrate the signs and symbols.

EXHIBIT 20

TRAINING SESSIONS/PLACE	CLERGY/FACULTY	NUMBER ATTENDING	AMOUNT of TIME	DATE
Notre Dame Academy HINGHAM	Religious Educators	125	4 hours	10/02/82
BOSTON	Public Healt. Nurses	10	2 hours	11/03/82
SOMERVILLE	Faculty, Grades 6-7-8	20	2 hours	11/17/82
St. Margaret's Hospital DORCHESTER	Seminarians from the Archdiocese of Boston	4	2 hours	11/18/82
BROCKTON	High School Faculty	40	2 hours	11/22/82
KINGSTON	Faculty Grades K through 12	50	4 hours	11/30/82
SOUTH EASTON	Religious Education Coordinators	40	2 hours	12/08/82
St. Margaret's Hospital DORCHESTER	Catholic Charities Representatives	10	2 hours	01/12/83

EXHIBIT 20 – Continued

TRAINING SESSIONS/PLACE	CLERGY/FACULTY	NUMBER ATTENDING	AMOUNT of TIME	DATE
HOLBROOK	Faculty, Grades 5-6-7-8	10	3 hours	01/12/83
SOMERVILLE	Somerville Ecumenial Clergy Association	15	2 hours	02/04/83
BRIGHTON	Deacons at St. John's Seminar	12	2 hours	02/09/83
TOTALS		336	27 hours	

No. 87-253, 87-431, 87-462

Supreme Court, U.S.
FILED
JAN 12 1988
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1987

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, APPELLANT

v.

CHAN KENDRICK, ET AL.

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, APPELLANT

v.

CHAN KENDRICK, ET AL.

CHAN KENDRICK, ET AL., CROSS-APPELLANTS

v.

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

JOINT APPENDIX
VOLUME II

JANET BENSHOOF
LYNN M. PALTROW
DAWN JOHNSEN
RACHAEL PINE
American Civil Liberties Union Foundation
132 W. 43rd Stree:
New York, New York 10036
(212) 944-9800

BRUCE J. ENNIS
Ennis, Friedman, Bersoff & Ewing
1200 17th St., N.W.
Suite 511
Washington, D.C. 20036
(202) 775-8100

Counsel for Appellees and Cross-Appellants

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

Counsel for Appellant and Cross-Appellee

MICHAEL W. MCCONNELL
1111 E. 60th Street
Chicago, Illinois 60637
(312) 702-3306

Counsel for United Families of America

JURISDICTIONAL STATEMENT (No. 87-253) FILED AUGUST 13, 1987

JURISDICTIONAL STATEMENT (No. 87-431) FILED SEPTEMBER 14, 1987

JURISDICTIONAL STATEMENT (No. 87-462) FILED SEPTEMBER 16, 1987

PROBABLE JURISDICTION NOTED NOVEMBER 9, 1987

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Letter from Thomas Millet to Janet Benshoof Regarding Religiously Affiliated Grantees, Attached to Defendants' Memorandum of Points and Authorities in Reply to Plaintiffs' Opposition to Motion for a Stay, filed May 6, 1987 794

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The following opinions and orders have been omitted in printing this joint appendix because they appear on the following pages in the appendix to the Appellant's Jurisdictional Statement.

Opinion of the United States District Court for the District of Columbia, filed April 15, 1987 ..... 1a

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Exhibit Excerpts of
Reverend John E. Forliti,
Director of Youth Programs and
Project Director for Search Institute's
Life and Family National Demonstration Project

EXHIBIT 1

Excerpt from Search Institute Grant Proposal

* * * * *

The six features make this proposed program substantially different from other programs. The features have been chosen to maximize the probability that the program will receive widespread use in a variety of settings and effectively promote sexual restaint among early adolescents. It is, we believe, the kind of program which is needed by schools and youth agencies to (1) lessen the severe psychological, economic, and social costs currently associated with adolescent sexual activity and (2) promote a life and value orientation among youth and parents which positively contributes to the stability of person, family, and society.

In addition to the innovative features listed above, the project has the advantage of building on the work Rev. John Forliti of the Search Institute staff has done in developing a value-based sex education model for the Roman Catholic Church. Titled "Reverence for Life and Family: A Catechesis in Sexuality", this model will provide the foundation from which the proposed program is being adapted. It incorporates some of the distinctive features planned for the proposed project, including significant parent involvement and a value-based approach. Because of his experience in writing and producing this program and his expertise in disseminating this project on a national level, Forliti brings to the proposed project the kind of expertise which will enhance its quality.

The "Reverence for Life and Family" model was first published in 1979 by the Archdiocese of St. Paul Minneapolis. Originally intended for local use only, it soon developed a national reputation. It has received high accolades from educators, parents, and youth. In 1981, the Wm. C. Brown Company of Dubuque, Iowa, published a revised edition and extended its availability even further. In February 1983, the publisher estimated that current participants numbered 150,000 with many new inquiries being received daily. These participants represented nearly all of the 50 states, plus Australia, Newfoundland, Canada, Italy, and Puerto Rico.

* * * * *

EXHIBIT 8

President's Report to Board of Directors, Search Institute

* * * * *

Religious Identification

Our mission always has been to include the religious dimension in our research. This has been so prominently an emphasis that, several years ago, before adopting the name Search Institute, Dr. James Dittes proposed we adopt the name of Religious Center.

We have found that religious beliefs and values powerfully predict what people will say and do have called attention to this fact. To remain silent because its deals with religion would be dishonest to our purpose of wanting to share whatever information will impact the lives of people.

Because of our identification with the study of religion, we are being identified as a religious institute (note ACLU suit), though we are registered as a scientific and educational agency and operate as such. One temptation for staff can be to become overly circumspect and cautious in the future regarding their sharing of religious information. Note: The Pitton Foundation that is giving us $25,000 for the writing of a book on the Young Adolescents and Their Parents Study want to review the manuscript before publication.

Do you, as a Board, wish to identify a policy stance? One procedure will be to request a position paper that identifies us as in the business of studying religion and not promoting religion. This could precede discussions and goal setting in the fall. It will help our new president, Peter Benson, to have a clear delineation of our limits and prerogatives with respect to religion.

* * * * *

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 83-3175

CHAN KENDRICK, ET AL., PLAINTIFFS,

v.

MARGARET HECKLER SECRETARY OF THE DEPARTMENT OF HEALTH AND HUMAN SERVICES, ET AL., DEFENDANTS.

DEFENDANT'S STATEMENT OF MATERIAL
FACTS PURSUANT TO LOCAL RULE 1-9(i)

St. Ann's Infant and Maternity Home

1. St. Ann's Infant and Maternity Home is located in Hyattsville, Maryland. St. Ann's is owned by the Archdiocese of Washington of the Roman Catholic Church and operated by the Daughters of Charity. (Declaration of Sr. Elyse Staab, ¶¶ 2-3).

2. St. Ann's has a Corporate Board composed of the Archbishop of Washington, the Vicar-General of the Archdiocese, the Chancellor, the Administrator of St. Ann's, the Director of Catholic Charities for the Archdiocese (a lay position), and two lay persons. (Staab Declaration, ¶ 4).

3. St. Ann's is managed by a Board of Trustees and not the Corporate Board. The Board of Trustees is composed of lay persons, except that members of the Corporate Board are ex-officio members of the Board of Trustees. The Administrator of St. Ann's reports to the Board of Trustees. The Administrator does not report to or have regular contact with anyone on the staff of the Archdiocese. (Deposition of Sr. Elyse Staab, pp. 4, 11-14).

4. St. Ann's was incorporated by an Act of Congress in 1860 to provide care for orphans and pregnant women. 12 Stat. 798. St. Ann's provides care services for pregnant, unmarried women and neglected or abused children. Project Application, pp. 25-26. St. Ann's provides to pregnant adolescents and their families complete pre-natal care, and accredited educational program, psychiatric consultation, social services, individual and group counseling, and a range of recreational activities. It receives funding from the District of Columbia Department of Human Services and local Departments of Social Services in the state of Maryland. (*Id.*; Staab Deposition, p. 19).

5. St. Ann's operates a high school for its clients. This high school is accredited by the state of Maryland. (Deposition of Barbara Rosengard, p. 110.) The high school program employs five full-time teachers and two part-time teachers. One full-time teacher and two part-time teachers are paid with federal funds from the AFLA grant to St. Ann's. Only one of the teachers is a member of a religious order, and teaches social studies, history, and provides individualized instruction in remedial work. The principal of the school is a lay person. She reports to the Director of Maternity Services, who is a member of the Daughters of Charity. The high school has a capacity for educating twenty-five students. The high school program does not include any courses of religious study required of all students. (McNeil Deposition, p. 52).

6. St. Ann's facility is contained in one building. Religious symbols are present in parts of the building. The building contains administrative offices, program space, residential areas, and a chapel. Services are held in the chapel for the members of the Daughters of Charity who reside at St. Ann's. Clients at St. Ann's are free to attend services in the chapel if they wish. Attendance at services by the clients is not required. Most of the clients at St. Ann's are non-Catholic and it is rare for a client to attend services at the chapel. St. Ann's makes no effort to en-

courage clients to attend services at the chapel. The residential areas are self-contained units, separate from the other parts of the building. (McNeil Deposition, pp. 16-17, 87).

7. St. Ann's mission is to provide social welfare services to clients. The Title XX program for pregnant adolescents includes prenatal care, counseling, education, social services, and recreational activities. While the Daughters of Charity at St. Ann's are motivated to provide these services because of their religious beliefs, it is not the mission of the Daughters of Charity at St. Ann's to teach Catholic tenets or doctrines or to engage in proselytizing or propagating the Catholic faith. (McNeil Deposition, p. 89).

8. St. Ann's employs approximately 85 lay staff persons. (Plaintiffs' App. III-A p. 459). Eight members of the Daughters of Charity are employed at St. Ann's. (Deposition of Sister Betty Ann McNeil, p. 17).

9. The parties stipulate that the philosophy of St. Ann's is reflected in its Employee Handbook. St Ann's does not provide abortion counseling.

10. Any client who calls St. Ann's directly for services is routinely referred to a social service agency for counseling. Pregnant adolescents who contact St. Ann's for services after counseling have already decided to continue their pregnancies to term. They contact St. Ann's to obtain the maternity services available there. (McNeil Deposition, p. 19).

11. St. Ann's accepts referrals of clients from agencies in the community. The basic criterion for acceptance of a client by St. Ann's is the individual's need. Religion is not a factor in the decision to accept a client. (McNeil Deposition, p. 47).

12. St. Ann's also informs potential clients of its services, through distribution of pamphlets in neighborhood centers, public schools, laundromats, and other places where the general public could have access to them. St.

Ann's also employs social workers in an Outreach program. These social workers visit potential referral sources, such as clinics, hospitals, schools and social service agencies, to explain the services available at St. Ann's. (McNeil Deposition, pp. 72-75).

13. St. Ann's is a grantee of federal funds under the Adolescent Family Life Act. In FY 1982, St. Ann's received a grant of $200,000 under the Act. (Notice of Grant Award). In FY 1983, St. Ann's received a grant of $235,000. (Notice of Grant Award.) This amount included an additional $35,000 above the amount requested by St. Ann's. (McNeil Deposition, p. 38-39). Defendant allocated this additional amount to St. Ann's after ascertaining that the St. Ann's program was operating well and that St. Ann's had a need for additional funding. (Deposition of Marjory Mecklenberg, p. 247; McNeil Deposition, p. 39).

14. The grant application was written by Sister Elyse Staab, Administrator of St. Ann's, with the assistance of persons from the Providence Hospital Center for Life and Catholic University. The original application was revised approximately two months after its submission. The revisions were intended to more accurately reflect the content of the proposal.

15. St. Ann's operates a care program for pregnant adolescents with the funds provided under the Act. This program is entitled Pathways. The Pathways program has three major components: 1) a residential program for pregnant adolescents who live at St. Ann's and attend high school there, 2) a day program for pregnant adolescents who attend high school at St. Ann's, 3) and an aftercare program for adolescents who reside and attend high school at St. Ann's after delivery. (Deposition of Sister Betty Ann McNeil, p. 15).

16. St. Ann's subcontracts part of the Pathways program to the Providence Hospital Center for Life in Washington, D.C. (Staab Deposition, p. 22). Providence Hospital is affiliated with the Daughters of Charity. (Deposition of Robert Hutson, p. 13).

17. Providence Hospital was incorporated by an Act of Congress in 1864. 13 Stat. 43. Providence Hospital is exempt from federal income taxes under § 501(c)(3) of the Internal Revenue Code of 1954. Providence Hospital is governed by a Board of Trustees. The members of the Board of Trustees are not members of the Roman Catholic clergy. (Hutson Deposition, p. 12).

18. The parties stipulate that Providence Hospital Statement of Philosophy, No. 1.01 (December 22, 1973), reflects the philosophy of Providence Hospital. Providence Hospital does not perform abortions or provide artificial methods of contraception.

19. The Center for Life has a Board of Trustees that controls the work of the Center to insure that it is appropriate to community needs. The Center for Life operates six continuing programs: (1) a Reduced Fee Maternity program, which provides medical services to needy pregnant women, (2) a Natural Family Planning Program, (3) the Rainbow Program, an adolescent fertility awareness program, (4) a Tele-Care program, a telephone reassurance program for homebound elderly persons, (5) Crossroads, a volunteer counseling service for terminally-ill persons, and (6) Lifeline, a personal medical emergency response system. (Hutson Deposition, pp. 8-9).

20. As a subcontractor for the St. Ann's grant, the Center for Life provides classes to adolescents in the St. Ann's program. These classes include sessions on fertility awareness, contraception, natural family planning, and intimacy. (Deposition of Christine O'Keeffe, p. 35). Participants in the Pathways program are required to attend the sessions on fertility awareness, contraception, and intimacy. Participation in the natural family planning

classes by the adolescents at St. Ann's is optional. (O'Keeffe Deposition, p. 58). The instructors of these courses are not members of the clergy. (O'Keeffe Deposition, p. 35).

21. The classes taught in the Pathways program by the Center for Life are based in part on a preexisting program developed by the Center called the Rainbow program. The Rainbow program was developed by the Center for presentation to teenagers and parents in the Washington metropolitan area. In adapting the Rainbow program for use at St. Ann's, a conscious effort was made to remove all religious references contained in the Rainbow program. (O'Keeffe Deposition, pp. 90-93).

22. In the presentations at St. Ann's, Chris O'Keeffe, an instructor from the Center has, in the past, made available to the participants books and other materials. These books and materials were either handed out during the sessions or left at St. Ann's for the participants to examine if they wished. Handouts have included a booklet from the Rainbow program, an HHS publication entitled "Eight Popular Reasons for Having Intercourse," a brochure entitled "Knowing is Caring and Caring is Sharing," and an article entitled "The IUD Story of Pain and Risk." Other publications that have been left with the residents at St. Ann's for them to examine if they desired, have included the following books: "Fertility Awareness," "The First Nine Months of Life," "Through Sex to Live," "Birth Control – Why Are They Lying To Women," "Sex, Love, and the Believing Girl" and "The Good News About Sex." (O'Keeffe Deposition, pp. 24-25).

23. St. Ann's has provided services to approximately 268 pregnant adolescents, 61 adolescents mothers, 11 infants, 26 fathers, and 80 other persons under the Title XX program.

24. St. Ann's does not have a religious mission. St. Ann's does not engage in teaching religious doctrine or propagating the Catholic faith. (Declaration of Sr. Elyse Staab, ¶ 5.)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 83-3175

CHAN KENDRICK, et al.,

v.

MARGARET HECKLER, SECRETARY OF THE DEPARTMENT OF HEALTH AND HUMAN SERVICES, ET AL., DEFENDANTS.

DEFENDANT'S STATEMENT OF MATERIAL FACTS PURSUANT TO LOCAL RULE 1-9(i)

* * * * *

Catholic Family Services of Amarillo

1. Catholic Family Services, Inc., Amarillo, Texas, is a non-profit, tax-exempt charitable organization incorporated under the laws of the state of Texas, operating as the social service agency for the Roman Catholic Diocese of Amarillo, Texas. Defendant's App. 514007 (1982 Grant Application, p. 18); Declaration of Larry Watson, Executive Director, ¶ 2. The agency does not hold religious observances as part of its functions and its offices are not adjacent to or part of any place of religious worship. Watson Dec. ¶¶ 16-17.

2. Catholic Family Services ("CFS") provides social services to individuals within western Texas on the basis of need. Services are provided without regard to clients' religious backgrounds. In fiscal year 1984 approximately 66% of the clients of Catholic Family Services were not members of the Roman Catholic faith. Watson Dec. ¶¶ 4, 16; Def. App. 514007 (1982 Grant Application, p. 18).

3. Services provided by Catholic Family Services include maternity and adoption services, a maternity home, adolescent pregnancy care and prevention services,

emergency assistance, youth and family counseling, migration and resettlement services, and home and family intervention services. Def. App. 514008-514009 (1982 Grant Application, pp. 19-20); Watson Dec. ¶ 5.

4. The purpose of CFS, as enumerated in its Articles of Incorporation include:

> (A) Works of charity of every description.
>
> (B) The collection and administration of funds for the purpose of carrying out charitable work, including the right to apply for and receive and use, any monies granted by Federal, State or Local governmental agencies.
>
> (C) Relief work among the poor and needy.
>
> (D) To provide screening of adoptive couples and to make appropriate disposition of their application. To conduct adoptive studies.
>
> (E) To place children for adoption within the State of Texas.
>
> (F) Placement will be made in conformity with the existing Texas laws relating to the placement of children.
>
> (G) To work with and cooperate with any federal, state or privately owned employment agency for the purpose of seeking employment for the jobless.
>
> (H) To esablish a central office which shall be used as a clearing house for all social work functions that are done under the direction of the Roman Catholic Diocese of Amarillo, State of Texas.
>
> (I) To keep in said office records concerning Catholic charitable, welfare and social work service currently done and which shall be done in the future. The office shall also be used as a bureau of information regarding such activities.

(J) To make disposition of all cases which may come to its attention by either rendering direct service or by referral.

(K) To promote social work service on a systematic and uniform basis in cooperation with the various existing social agencies to the end that there may be avoidance of inappropriate duplication of service.

(L) To provide social work service to unwed mothers regardless of religion.

(M) To place children from Catholic Children's Home, Panhandle, Texas, for adoption and in foster homes.

Articles of Incorporation. (Plaintiffs' App. IV, pp. 66-71).

5. The Board of Directors of CFS is responsible for the overall operation and policy of the agency. There are twenty-two members of the Board: eight private businessmen, two attorneys, two professional social workers, one Methodist minister, one physician, three housewives, one farmer, one college educator, two Catholic priests, and one elected official. The Bishop of the Diocese, L.T. Matthiesen serves as an ex-officio member of the Board and retains authority over use of Diocesan-owned property and issues involving basic doctrine. Watson Dec. ¶ 2.

6. Catholic Family Services is accredited by the Council on Accreditation of Services for Families and Children, It is licensed by the Texas Department of Human Resources as a child placement agency and maternity home service provider. Def. App. 514009 (1982 Grant Application, p. 20); Plaintiffs' App. IV. p. 73; Watson Dec. ¶ 6.

7. CFS memberships include the Texas Association of Licensed Children's Services, Texas Coalition for Juvenile Justice, and Amarillo Community Council. Def. App. 514009 (1982 Grant App. p. 20); Plaintiffs' App. IV, p.73.

8. CFS receives funding from the following sources in these approximate proportions: fees for services-15%; individual and organizational donations-10%; Catholic churches-.7%; Diocese of Amarillo-1.4%; U.S. Department of Health and Human Services-19%; Texas Commission on Alcoholism-2.1%; Knights of Columbus-1.5%; Texas Department of Human Resources-34%; other-16.3%. Watson Dec. ¶ 7 & Exh. 1.

9. CFS does not attempt to inculate the tenets of the Roman Catholic Church to the recipients of its services or the general public. CFS does not have a religious mission, but renders its services out of a belief in a responsibility to provide service to others without expecting a return of that service or that the person served accepts the Roman Catholic faith. Watson Dec. ¶ 10.

10 . Employees of CFS are hired on the basis of qualifications and experience without regard to their religious backgrounds. Watson Dec. ¶ 8.

11. Of the eight top-level administrators of CFS, five are non-Catholic, and the Executive Director is a Methodist. Approximately 55% of the staff are not Catholic. Watson Dec. ¶ 8.

12. CFS employs primarily social work professionals and professionals in related fields. The staff is exclusively lay people. Watson Dec. ¶ 9.

13. Mr. Larry Watson, the Executive Director of Catholic Family Services, also the Project Director for the combination care/prevention project funded under Title XX, holds a Master's degree in social work and is a state certified social worker and a licensed professional counselor. Watson Dec. ¶ 1.

14. Catholic Family Services is a grantee of Federal funds under the Adolescent Family Life Act (the "Act"). In FY 1982, it was granted $250,957 to operate a combined care and prevention program. Def. App. 514001. $80,957 of this amount was granted for prevention services and the remainder was granted to support care services. *Id.* at

514002. In FY 1983, Catholic Family Services was awarded $250,000 under the Act, with $80,000 to be used for prevention services and the remainder for care services. *Id.* at 514003-514004. In FY 1984, it was awarded $214,000, with $68,480 of that amount to be used for prevention services. *Id.* at 514005-514006.

15. No official connected with the Diocese has attempted in any way to direct, control or contribute to decision-making with respect to the CFS Title XX grant program. Watson Dec. ¶ 3.

16. The care services provided by Catholic Family Services under the federally funded program include pregnancy counseling and testing, adoption services, pre- and post-natal medical care, child care, in-home homemaker services, family planning information and referral service, consumer education, and educational and vocational counseling. Plaintiffs' App. IV, p.76; Def. App. 514010, 514016-514017 (Year End Progress Report, December 19, 1983; 1982 Grant App. p.24). By the end of the 1983 grant year, CFS provided care services to approximately 400 adolescents. Def. App. 514018 (1984 Continuation App., p.21).

17. CFS only provides family planning by referral to agencies such as Planned Parenthood. CFS no longer offers Natural Family Planning to its clients. Watson Aff. ¶ 18.

18. In relation to the care project, the grant application states that "clients must be provided with an atmosphere where they can consider the options objectively," and discusses the opening of a maternity home in October 1982 which will aid pregnant adolescents by providing group contact with other pregnant adolescents facing the same decision about the future of their child and reducing social and peer pressure to keep their baby. Plaintiffs' App. IV, p.78.

19. The agency Policy & Procedure Manual states that CFS may not impose traditional Catholic teachings related to the issues of contraception, abortion, and sexual matters upon its clients, and that the CFS staff may inform clients of the services of Planned Parenthood if the client plans to have an abortion. Watson Dec. ¶ 18, Exh. 2.

20. The prevention services provided under the Federal grant include the development and presentation of symposia on teenage sexuality and decision-making for adolescents and their families, community courses to encourage parents to be the primary sex educators of their children, and counseling for sexually active adolescents and their families. Def. App. 514011-514013 (Year End Progress Report, December 19, 1983). Presentations and symposia by Catholic Family Services are given to church groups, public and private school groups, civic organizations, and at government agencies. *Id.* at 514014-514015 In addition, the Catholic Family Services prevention program includes counseling adolescents referred to it by local juvenile probation offices. *Id.*

21. CFS' goal has been to make its services available to the general public and "efforts are continually made to develop relationships with public schools and other youth organizations." Watson Dec. ¶ 20.

22. CFS has entered coordination of service agreements with the following agencies: Texas Department of Human Resources Protective Services, Juvenile Probation Office-Plainview, South Plains Health Providers-Plainview, Day Care Association of Lubbock, Terry County Juvenile Probation Department, Hockley County Juvenile Probation, Lubbock City Health Department, Texas State Board of Health, South Plains Community Action-Levelland, Moore County Planned Parenthood, Dumas Family Service Center, Texas Department of Health, Amarillo Bi-County Health Department, Texas Tech University Health Sciences Center, Amarillo State

Center, Dumas Family Services, Parenting Services, Inc., Texas State Technical Institute, Potter County Juvenile Probation, Amarillo Public School System. Watson Dec. ¶ 19.

23. Materials used in the prevention/care project were screened by an advisory committee for appropriateness for use with the general public. Watson Dec. ¶ 21. In Amarillo the Committee was composed of a registered nurse from Texas Tech University, a high school student, an agriculture extension agent, a social worker from Parenting Services, a personnel director from High Plains Baptist Hospital, a teacher from high school for pregnant teenagers, a group home foster parent, a counselor from Women's Program at Amarillo College, a Director of Special Education for Amarillo Independent School District, a Catholic priest, a youth director of Diocese of Amarillo, and the Director of West Texas State campus ministries. In Lubbock the Committee consisted of parents, a pediatrician from Texas Tech, the Director of Right to Life, a social worker from a state mental health agency, and three teenagers. Watson Dec. ¶ 21.

24. Catholic Family Services obtains parental consent in accordance with the provisions of the Act in providing prevention and care services. Def. App. 514019 (1984 Continuation Application at p. 25).

25. In its provision of service in the grant project, CFS does not include any religious service, observance, prayer, lecture, event, or other function. While individual sponsoring groups may choose to begin with a prayer before the project presentation by CFS staff, prayers are not part of the CFS presentation and are not initiated by CFS staff. Watson Dec. at ¶ 15.

26. As of September 31, 1984, CFS had presented 15 youth symposia on "Teenage Sexuality and Decision-Making" and 15 courses on "Parents as the Primary Providers of Sex Education" at: 16 churches, 4 parochial

schools, 1 county detention center, 1 community center, 1 child welfare office, and 1 CFS office. Watson Dec. at ¶ 11. The curriculum and presentation in these symposia was not based on religion or religious doctrines. The syposiums are available to any group requesting a presentation. Watson Dec. ¶ 11.

27. Brief public presentations to adult and youth organizations on the subject of teenage sexuality and decisionmaking have been made at approximately 33 churches, six public schools, two parochial schools, 14 social agencies, two civic clubs, and seven miscellaneous sites. Watson Dec. at ¶ 12.

28. Speeches concerning adoption have been made at 13 social service agencies, two state universities, three civic clubs, seven public schools, four hospitals, six churches and one at a public library. Watson Dec. at ¶ 13.

29. For the period October 1983 through May, 1984, personal visits presenting information concerning adoption and other services of the project were made at approximately 24 public schools, 47 social service agencies, two colleges, nine hospitals, 32 churches, two civic groups, eight courthouses, two parochial schools, and eight radio and TV stations. *Id.* at ¶ 14.

30. Social workers in the Title XX prevention/care project provide services from a non-judgmental perspective. It is not the policy of CFS or its staff to make decisions for clients or advocate particular solutions as moral or immoral. Professional social workers are instructed that their role is simply to help the client identify the available options. This CFS philosophy is consistent with the Code of Ethics of the National Association of Social Workers, to which CFS social workers subscribe. Watson Dec. ¶ 23.

31. CFS has not utilized its grant funds under Title XX to promote religion or the tenets of the Roman Catholic faith. Watson Dec. ¶ 23.

Catholic Social Services of Wayne County

1. Catholic Social Services of Wayne County ("CSS") is a voluntary community social service agency incorporated in 1957 under Michigan law as a non-profit organization. It is a division of the Department of Christian Services of the Archdiocese of Detroit, but is administered and managed by a Board of Directors, which has sole responsibility for the day to day operation of the agency and for setting agency policy. Affidavit of Gail Zettel, Director of Adolescent Family Life Act Demonstration Project, ¶ 2.

> The agency's purpose is to enrich, strengthen and support family life and enhance psychosocial functioning through the planning, development, and delivery of professional social work service, and ancillary services for all peoples of Wayne County, without regard to age, sex, race, religion, handicap, or economic status.

CSS Mission Statement, (Plaintiffs' App. IV p. 342) (Answer to Plaintiff's Interrogatory #1); Zettel Aff. ¶ 3.

2. The Board of Directors is composed of twenty-six laymen (e.g. business persons, attorneys, educators, community representatives) and three clergy members. Zettel Aff. ¶ 2 & Exh. B.

3. Funding for CSS for the most recent fiscal year came from the following sources in these approximate amounts: Government Fees and Grants-59.6%; United Fund-28%; Service Fees-10.6%; Archdiocese of Detroit 1.8%. Zettel Aff. ¶ 4.

4. Among the social services provided by CSS for individuals are:

> counseling with marital difficulties, emotional problems, personality disorders, pregnancy, substance abuse, youth problems, concerns of older persons, foster family care, adoption, Family Life Enrichment,

> and Client Advocacy. In addition, Foster Grandparents and Retired Senior Volunteer Programs are administered by the agency.

(Plaintiffs' App. IV, p. 343); Zettel Aff. ¶ 6.

CFS is a member of the Family Service Association of America, licensed by the State of Michigan as a child placement agency, and accredited by the Council of Accreditation of Services for Families and Children. Def. App. 307009 (1982 Grant App., Description of Agency, p. 15).

5. The President of CSS, Timothy F. Ryan, is a professional social worker. Zettel Aff. ¶ 5 & Ex. C.

6. CSS does not discriminate on the basis of race, color, religion, age, sex, disability, national origin, social or economic status, handicap or other conditions prohibited by law. CSS' policies prohibit discrimination in employment, including promotion, Board membership or client elegibility for services. Zettel Aff. ¶ 7.

7. Of the 75 member professional staff only one person is a clergy member, a nun whose capacity at CSS is as a psychologist. Zettel Aff. ¶ 8.

8. In 1982 CSS received a grant from OAPP to conduct a prevention project under Title XX in the amount of $85,000. Def. App. 307001-307002 (1982 Notice of Grant Award). In 1983 the CSS grant was continued at that level. Def. App. 307003-307004 (1983 Notice of Grant Award). It was continued in the amount of $73,600 in 1984. Def. App. 307005. The project is referred to as Communications Around Sexual Issues (C.A.S.I.).

9. The mission or philosophy of the C.A.S.I. is:

> The C.A.S.I. program operates on the philosophy that premature sexual activity and adolescent pregnancy in our culture are often symptoms of unmet needs or other family distress. Research indicates that young people who receive the majority of formal sexuality education from their families signifi-

cantly delay the onset of sexual activity. At the same time adolescence is a time when the young person needs to separate from his/her family of origin and establish himself as a productive, independent person.

The C.A.S.I. program seeks to balance these needs to produce a creative, functional relationship between parents and teens. C.A.S.I. relies heavily on the work of Erik Erikson as well as family theory developed by Murray Brown, Jay Haley and others. Our approach is the Family Life Education Mode.

C.A.S.I. Philosphy and Mission Statement, (Answer to Plaintiffs' Interrogatory #1); Zettel Aff. ¶ 10.

10. The general objective for the project is stated as:

Using a Family Life Education model, groups will be provided for parents and their adolescents. The goal of the group will be to help parents and adolescents understand sexual development, open lines of family communication and strengthen the role of parents. Training will be offered to school personnel and others dealing with adolescents to provide ways of reinforcing the family as a whole in the area of understanding and dealing with sexuality.

Def. App. 307006 (1982 Grant App., Narrative, p. 2).

11. This objective was to be achieved by forming groups of parents and their adolescents and providing six sessions to each group with parents and adolescents participating separately but concurrently. The sessions provide accurate information and allow participants assistance in reflecting on their own values. The sessions are intended to help parents and adolescents:

understand sexual development as a means of opening lines of communication among family members and strengthening the role of parents in dealing with adolescent sexual activity. Adolescents will be helped

to understand and deal more effectively with peer and societal pressures that can lead to premature sexual activity.

1982 Grant App., Narrative, p. 3 (Plaintiffs' App. IV, p. 341).

12. The target audience for the project is nonpregnant adolescents under seventeen and their families recruited through schools (public and parochial), parent-teachers groups, churches, recreational facilities (e.g. YWCA, YMCA), and similar organizations. 1982 Grant App., Narrative, p. 7 (Plaintiffs' App. IV, p.364); Zettel Aff. ¶ 9

13. The staff of the Adolescent Family Life Demonstration Project has not provided any religious or spiritual service, lecture, or event as a part of or in conjunction with or in cooperation with a Title XX grant project, nor have any such events occurred during its groups or workshops. Def. App. 307048 (Answers to Plaintiffs' Interrogatory #5). The project was not intended to present and has not presented a religious point of view. Zettle Aff. ¶ 12.

14. The Project Director of the project is Gail Zettel, who holds a Master in Social Work from the University of Michigan and is a member of the Academy of Certified Social Workers (A.C.S.W.) and the National Association of Social Workers. She is not Catholic. Zettel Aff. ¶ 1 & Exh. A.

15. A Citizens Advisory Committee was formed to review materials for the C.A.S.I. course. Membership on the committee was open to all who wanted to participate, and members were solicited from health professions, social workers, educators, politicians, clergy, and minority groups. As constituted, the advisory committee was composed of representatives from the medical profession, health education, social work, parents, private businesses, lay persons representing the Hispanic Community, and religious organizations (Catholic and Protestant). Among

the members of the committee were individuals associated with The Family Life Office of the Archdiocese of Detroit (one), CSS (two), the Christian Service Department of the Archdiocese of Detroit (one), the Office for Hispanic Affairs of the Archdiocese (one), St. Matthias Church (one), and Natural Family Planning (one). Zettel Aff. ¶ 11; Plaintiffs' App. IV, pp. 346, 350.

16. The committee representatives from the Archdiocese had specific expertise not relating to theological concerns: The representative from the Office of Hispanic Affairs assisted in translating materials into Spanish and in publicizing the program in the Hispanic Community. The representative from the Christian Service Department was a graphic designer who assisted in the preparation of brochures and in editing C.A.S.I. publications for style only. Zettle Aff. ¶ 11.

17. A draft curriculum outline was submitted to OAPP in December 1982. Def. App. 30701-307021. The curriculum does not contain religious references or statements. *See id*; Def. App. 307022-307033 (Curriculum submitted to HHS, Feb. 13, 1984 to OAPP).

18. The curriculum used in the C.A.S.I. project was written by Gail Zettel, independently from anyone in the office of the Archdiocese. Members of the Citizens' Advisory Committee assisted in reviewing the material and one representative from the Archdiocese helped in editing the curriculum because of her expertise in editing. Zettel Aff. ¶ 15.

19. Originally the brochure to be distributed to the public was to have the names of the Archdiocese of Detroit and CSS listed. To more accurately reflect the status of the project, the wording was changed to "Federally Funded Adolescent Family Life Demonstration Project, administered by Catholic Social Services of Wayne County." Zettel Aff. ¶ 13; Plaintiffs' App. IV, p. 347.

20. Among the groups approached to publicize the project were: Family and Neighborhood Services, Dearborn Public Schools, Detroit Public Schools, Public TV Channel 56, The Detroit News, Women's Resource Center of Oakland Community College, Livonia Public Schools, Radio Stations WXYZ, WWJ, WDIV, Channel 4, United Cable Vision, the Mellus Newspapers, The Northeast Detroit Newspaper, Von Stueben Homeowners Newspaper, The Trenton Times, Metropolitan Hospital Association, Observer and Eccentric Newspapers, Dearborn Times Herald, and Grosse Point News. Zettel Aff. ¶ 16.

21. Outreach efforts (telephone calls, letters, in person contacts), in addition to the mass mailings to parishes and 21 churches, included contacts with over 77 public, community nonsectarian organizations such as hospitals, public schools, state and local health and social service agencies, education institutions, neighborhood associations, charities, recreation organizations, parent-teacher groups, and local political subdivisions. Among the organizations which the Project has contacted in its outreach are: The Detroit Public Schools, River Rouge Public Schools, P.T.A., Livonia Public Schools Adult Education, "Teen Stop" Health Services of Detroit Health Department, State of Michigan Board of Education, Norwayne Residents Association, Wayne Club for the Developmentally Disabled, YWCA's, Campfire, Inc., Hospitals, Parents Anonymous, Detroit Mayor's office. Zettel Aff. ¶ 17; Plaintiffs' App. IV, 360, 391 (December 1983 progress report); Def. App. 307059 (1984 Continuation application, Project Summary, p. 13). In addition, news releases and flyers about the programs were sent to all newspapers in the metropolitan Detroit area. (See number 20 *supra*.)

22. In addition, press releases and flyers about the programs were sent by CSS to over 150 secular community, city, county, or private health, social service, education, charitable, and law enforcement organizations, agencies or corporations. See Zettel Aff. ¶ 17 for a partial list.

23. The general information brochure and fact sheet sent to all groups does not contain references to the Catholic Church, the Pope or other religious institutions. Zettel Aff. ¶ 18 and Exh. E; Def. App. 307057-307058. (Brochure attached to CSS answers to Plaintiffs' interrogatories).

24. Group participants were recruited from all agencies referred to in numbers 20 and 22 above, as well as through newspaper articles. Zettel Aff. ¶ 19.

25. Group meetings under the project have been held at eleven parish sites, and at 13 non-religious group sites including: P.A.C.T. (Parents and Children Together (3 groups), Foster Parents Coalition (3 groups), Family and Neighborhood Services, Golightly Vocational Center Parents Association, Wayne State University Center for the Retarded, Franklin Wright Settlement House, Downriver YWCA (2 groups), Western YWCA. Plaintiffs' App. IV, p. 368-72, Zettel Aff. ¶ 20.

26. Service orientation and informational meetings about the C.A.S.I. course were held at the following nonsectarian locations: Center Point Crisis Center, Delray Community Center, Chass Health Center, Ann Arbor Trail School, Detroit School Subcommittee on Human Sexuality, Barlingane Neighborhood Association Center for Creative Change, North Central City Hall, Metropolitan Hospital. Zettel Aff. ¶ 25. Information meetings were also held at the office of the Archdiocese of Detroit, the Archdiocese Christian Service Department, Church of the Good Shepherd School, St. Paul's School, St. Mary's of Wayne, Christ the King School, and Sacred Heart Seminary Vicar's meeting. Plaintiff's App., IV, pp. 368-72.

27. The project charges fees for the sessions on a sliding scale based on the individual's ability to pay. Zettel Aff. ¶ 21.

28. Observers are not allowed by CFS at the C.A.S.I. group program, including nuns and priests. Zettel Aff. ¶ 22. On one occasion, a nun (the school principal) and a priest attended one C.A.S.I. session held at St. Christine's without informing the Director beforehand. Because of this C.A.S.I. policy, they were asked to leave and did not attend subsequent sessions. *Id.*

A priest and nun did attend a general information meeting held at St. Gemma's School (Plaintiffs' App. IV, p. 374), but did not attend the actual sessions. Zettel Aff. ¶ 22.

29. If the issue of the Catholic Church's position on abortion is raised in a C.A.S.I. session by participants, instructors have been told by the project director to direct questions to a member of the Catholic clergy. Questions about the morality of abortion are directed to the questioner's family or religious leader. Zettel Aff. ¶ 27.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 83-3175

CHAN KENDRICK, et al.,

v.

MARGARET HECKLER, SECRETARY OF THE DEPARTMENT OF HEALTH AND HUMAN SERVICES, ET AL., DEFENDANTS.

DEFENDANT'S STATEMENT OF MATERIAL FACTS PURSUANT TO LOCAL RULE 1-9(i)

St. Margaret's Hospital of Dorchester, Massachusetts

1. St. Margaret's Hospital in Dorchester, Massachusetts is a voluntary, nonprofit hospital, incorporated under the laws of the Commonwealth of Massachusetts, offering obstetrical and gynecological services to women regardless of race, color or creed. It also provides ambulatory care to women, infants and children, provides shelter and prenatal care and education for unwed mothers at its facility on hospital grounds known as St. Mary's Home, coordinates educational programs, and conducts research (Fincke Exh. 3). It is an official referral hospital for high-risk expectant mothers and one of six centers in Massachusetts designated as a "transfer" hospital for high-risk newborns. (Pl. App., Vol. 2, p. 8, Employee Handbook, p. 2). It is affiliated with the Tufts University School of Medicine for the training of physicians. (Pl. App., Vol. 2, p. 3, *Id.* , p. 4).

2. St. Margaret's is a Catholic Hospital. It does not provide abortions (Fincke dep. p. 41). It also does not provide referrals for abortions or abortion counseling. (Hirsch dep. p. 13). The adolescents know that they have these options (Fincke dep p. 41). The Hospital also does not provide contraceptives and does not refer clients elsewhere for such services (Fincke dep. p. 40).

3. St. Margaret's is governed by an 18 person Board of Trustees. The Board includes both lay and clergy members, composed of 4 clergy (Cardinal Medeiros, Auxiliary Bishop D'Arcy, Rev. Richard Little, Rev. McNamara, Executive Director of Catholic Charities) and 14 laypersons. (Fincke dep. p. 64; A. 711215).

4. The Administrator of St. Margaret's at the time of its Title XX grant application was Sister Mary Alice Roach. Its current Administrator is Sister Kathleen Natwin.

5. According to its 1982 grant application, hospital services at St. Margaret's "are provided in accordance with the teachings and philosophy of the Roman Catholic Church." (Fincke Exh. 3), which was interpreted by the Director of its Family Life Education Program to mean that St. Margaret's served everyone without regard to race or creed (Conroy dep. p. 66).

6. St. Margaret's has a chapel (Hirsch dep. p. 57).

7. St. Margaret's is affiliated with a Massachusetts organization that works with pregnant or parenting teens, the Alliance for Young Families. Forty other agencies in the Boston area belong to it. (Hirsch dep. pp. 36-37).

8. St. Margaret's has a separate building facility known as St. Mary's school, an accredited alternative high school for pregnant adolescents, operated by St. Margaret's under contract with the Boston school system. It is open to all pregnant adolescents in Boston, with a capacity of 25. At any one time, approximately 4 to 5 of the residents of St. Mary's home attend it. It has no religious symbols and is not a parochial school (Fincke dep. pp. 60-63).

8A. St. Margaret's Hospital is not owned by the Archdiocese of Boston (Fincke dep. p. 64).

9. It is not a condition of employment at St. Margaret's that the individual be Catholic, nor is it a condition of receiving services at the hospital (Fincke dep. p. 65; Hirsch dep. p. 86).

10. Ms. Fincke's staff is approximately one-third Catholic, one-third Jewish, and one-third Protestant (Fincke dep. p. 66).

11. It is not a condition of residence at St. Margaret's home for unwed mothers, St. Mary's Home, that the adolescent be a Catholic (Hirsch dep. p. 86).

12. In April, 1982, St. Margaret's applied for a Title XX grant in which it proposed to offer both care and prevention services. (A. 711433) It was awarded $164,000 for prevention services and $282,806 for care services in 1982. (A. 711002) In 1983, its grant was renewed, $164,000 for prevention services and $302,000 for care services. (A. 711004; Pl. App. 11).

13. Prior to its receipt of grant monies under Title XX, St. Margaret's had been a grantee under a predecessor Federal statute known as Title VI. (Bouchard-Fincke dep. p. 10).

14. The St. Margaret's Title XX grant program has been composed of four separate components: Family Life Education (prevention), Decisionmaking Groups (care), Career Education (prevention), and postpartum pediatrics (care) (Fincke dep. p. 13) (see paragraph 90).

15. From August 1982 until March, 1984, Nancy Bouchard-Fincke was Director of the Family Life Services Department of St. Margaret's and the project director of the Title XX grant (Fincke dep p. 5). She had been hired to administer St. Margaret's Title VI program. As project director, half of her salary was paid for under the grant, as were the salaries of eight to ten individuals at St. Margaret's, including five individuals in the Family Life Education Department. (Fincke dep. p. 11). Ms. Frances Kellogg is the current Project Director.

16. Mary Conroy, a registered nurse and employee of St. Margaret's since 1955, has been the Director of the Family Life Education program. (Conroy dep. p. 6).

17. Janet L. Hirsch, a social worker at St. Margaret's, is the Coordinator of Social Services in the Family Life Social Services Department. She is responsible for the operations of St. Mary's Home, a staff of 6 social workers, and Decisionmaking Groups for adolescents considering adoption (Hirsch dep. p. 3). There are four other social workers in another Department, the Social Service Department (Hirsch dep. pp. 5-6).

18. Ms. Hirsch has reported to Ms. Fincke, while Ms. Conroy has reported to the hospital Administrator (Fincke dep. pp. 7-8; Hirsch dep. p. 32).

19. Ms. Fincke has not had any meetings with the Archdiocese of Boston concerning the Title XX grant (Fincke dep. p. 46).

Care Programs

20. The care component of the Title XX grant includes decisionmaking groups for adolescents, a post-adoption group, and training programs in the community (Hirsch dep. p 7).

21. Ms. Hirsch is in charge of these programs and supervises six social workers, two of whom are currently funded by the grant. The seven social workers employed in the Family Life Service Department of St. Margaret's counsel teenagers both in St. Mary's Home for unwed mothers and the outpatients being served by the Department. Formerly, half of Ms. Hirsch's salary was funded under the grant, but she is now paid in full by the hospital (Hirsch dep. pp. 4-6). The two social workers funded by the grant perform services identical to those conducted by the other social workers. The two social workers also run teenage Decisionmaking Groups, post-adoption groups and training programs. (Hirsch dep. pp. 7-8).

22. The Social Services Department of the Family Life Services Department sees about 300 adolescents each year (Hirsch dep. p. 40).

23. Of Ms. Hirsch's social work staff, all but one are lay people. The nun is not one of the staff funded by the grant (Hirsch dep. p. 86).

24. The adoption Decisionmaking Group is conducted by two of the social workers funded under the grant, and is an eight week group that explores motivations for pregnancy, examines myths and realities regarding parenting and adoption and focuses on decisionmaking to help the adolescents reach good decisions on whether to place their child for adoption. It also includes child care instruction. (Hirsch dep. pp. 69, 77-80). Approximately 80% of the participants parent and 20% choose adoption (Hirsch dep. p. 74).

24A. St. Margaret's sent its curriculum for the Decisionmaking Groups to OAPP on February 1, 1984 (A. 711328, 711329-711381).

25. Clients seen by Ms. Hirsch's staff are provided with full information on all methods of contraception and their use and whether the client will (or should) use birth control. Health risks associated with contraceptives would be discussed if the adolescent raised that issue. No specific referrals for contraceptives are made. The clients usually indicate that they know they can get contraceptives from local health centers or clinics. Clients are told that if they are going to remain sexually active, they should use birth control (Hirsch dep. pp. 48-50, 52).

26. Ms. Hirsch instructs her social workers that they may not counsel abortion or make abortion referrals. (Hirsch dep. p. 30).

27. Only one teenager who came to the Department for counseling has asked about abortions. Ms. Hirsch and the social worker discussed the issue and determined that

the teenager should go elsewhere for the information. The teenager subsequently chose to give birth and place her child for adoption (Hirsch dep. pp. 70-77).

28. If an adolescent indicated that she wanted natural family planning, Ms. Hirsch's staff could refer them to that part of the hospital. One adolescent has indicated an interest in natural family planning, but it is not known if she participated in the St. Margaret's natural family planning program. (Hirsch dep. p. 50).

29. St. Mary's Home is a home for unwed mothers with a maximum of 20 adolescents in residence at any one time. Approximately 80 to 100 are there during a year. The adolescent must be four months pregnant before she can stay there (Hirsch dep. pp. 54-55).

30. There are some crucifixes on some of the walls at St. Mary's, including the TV room and the lounge. It does not have a chapel (Hirsch dep. p. 56).

31. The residents receive counseling from Ms. Hirsch's staff and are educated by Ms. Hirsch's staff as to all methods of contraception (Hirsch dep. p. 75).

32. The residents of St. Mary's Home also receive individual and group counseling. (Hirsch dep. p. 76).

33. A priest is available to speak to the residents of St. Mary's if they wish to speak with him. (Hirsch dep. p. 38).

34. On only a few occasions (two or three) on an annual basis have pregnant adolescents in Ms. Hirsch's program inquired concerning whether to keep their child or have an abortion. In these situations, the social workers have asked the adolescents to examine why they are considering each option and what would be the consequences. In such situations, the social worker follows professional guidelines to help the client examine her own choices. If the adolescent requested an abortion referral, the staff would provide no specific suggestions. (Hirsch dep. p. 18, 22, 25-27).

35. The adolescents who participate in Ms. Hirsch's program are in the late second, or third trimester of their pregnancies, when abortion is no longer a viable option. (Hirsch dep. p. 78). This is true of the Decisionmaking Groups on adoption (Hirsch dep. pp. 79-80).

36. St. Margaret's has referral arrangements for adolescents with the Massachusetts Department of Social Services, Catholic Charities, Boston Children's Services, area hospitals such as St. Elizabeth's, Brigham and Women's and Beth Israel. (Hirsch dep. p. 41).

37. St. Margaret's also operates a 24 hour Teen Hot Line, staffed by employees of the Family Life Services Department. It receives zero to three calls per day (Hirsch dep. pp. 42-44). If teens call for abortion information, they are told that St. Margaret's does not provide that service and are given no referrals except the phone book (Hirsch dep. p. 45). If a teen thinks that she is pregnant, she is advised she can come to St. Margaret's for a free pregnancy test. (Hirsch dep. p. 45). The Hotline is not a funded activity under the Title XX grant.

38. Ms. Hirsch's social workers receive various training on family therapy, suicide prevention, nutrition, assessing social service needs of pregnant adolescents and career education (Hirsch dep. p. 47).

39. When clients have asked about birth control, there have been no questions raised or discussions about Catholic Church teachings on that topic. (Hirsch dep. pp. 52-53).

40. Ms. Hirsch's social work staff have performed training and information workshops at social service programs such as the Mannet Health Center, Concord Family Services, St. Elizabeth's Hospital, etc. on issues such as adoption awareness and sensitivity. (Hirsch dep. pp. 57-58).

41. Nursing staff at St. Margaret's see teenagers when they come in for a pregnancy test. (Hirsch dep. p. 59).

Two nurses and a midwife are available for counseling (Hirsch dep. p. 64).

42. If a test is negative, the teenagers are told they may receive instruction in natural family planning from the Hospital. They are not told about other methods of birth control or given referrals, since this is prohibited by the Hospital. (Bouchard-Fincke dep. p. 40).

43. While Project Director, Ms. Bouchard-Fincke was responsible for hiring the nurses who work in the Family Life Services Department. When interviewing applicants, she informed them of the Hospital's policies on abortion and contraception (Bouchard-Fincke dep. p. 42).

44. Ms. Hirsch's staff do not do any instruction or promotion of any specific religious views to any of the adolescents they see (Hirsch dep. p. 86). None of the materials used in Ms. Hirsch's care programs has religious content. (Hirsch dep. p. 87).

45. In the pediatrics portion of the care program, adolescents receive services from a Pediatric Clinical Nurse Specialist, who provides prenatal care and postpartum care, including home visits. The Nurse Specialist also offers Parenting Classes and a "Water Babies" class (1984 Continuation App., A. 711382-386).

Prevention Program

46. The Family Life Education program at St. Margaret's has presented courses on sexuality and family life to children in grades kindergarten through twelve at parochial, private and public schools in the Boston area, and to community groups.

47. During the 1982 and 1983 grant cycles, the Family Life Education program had been presented predominantly to Catholic parochial schools and parishes (A. 711387-711432).

48. As of February, 1984, one school in the Boston City school system and five other public schools had

received the St. Margaret's program. The Boston school received the program for only one grade, but has requested a full three-grade program. Ms. Conroy has received requests for it from public schools outside the city. (Conroy dep. pp. 96, 189-90).

49. Ms. Conroy has a staff of 12 health educators assigned to this program. The staff are all lay people and Ms. Conroy does not know if they are all Catholics (Conroy dep. p. 193).

50. Portions of the salaries of four of her staff, totalling 58 hours per week have been paid for by Title XX grant funds. These staff submit time cards to document their hours. Ms. Conroy's salary is not paid for by grant funds. (Conroy dep. pp. 26-27).

51. The Family Life Education program has constituted approximately 10—15% of the Title XX grant. (Fincke dep. p. 67).

51. The Hospital's Family Life Education Program has been presented through two separate curricula, the first entitled "Family Life Education Program" (Conroy Dep. Exh. 6) ("the first FLE curriculum"), and the second entitled "Family Life Education Program, APH-000-711-01-0" (Conroy Exh. 7) ("the second FLE curriculum"). Each of the written curricula contains information on human physiology, dating, adolescent sexuality, contraception and abortion. Grades K-9 receive general information on human anatomy, puberty and gestation. Only grades 10 to 12 are taught about contraception and abortion. The curriculum in grades 10 to 12 discusses the problems of drug and alcohol abuse.

52. The first FLE curriculum was developed over the course of several years and has been utilized by Ms. Conroy in parochial schools in the Boston area. (Conroy dep. pp. 90-94; Conroy Exh. 6).

53. When Ms. Conroy's staff has presented the Family Life Education Program in parochial schools or Catholic parishes, the first FLE curriculum has been used. (Conroy dep. pp. 90-94). Catholic schools have accounted for approximately 75% of these types of programs. (Conroy dep. p. 106).

54. The first FLE curriculum has never been presented in public or non-Catholic schools. The second FLE curriculum thus has been used at public or non-Catholic schools or for groups other than Catholic parishes. (Conroy dep. p. 198). The second FLE curriculum thus was presented to the Quincy Point Congregational group (Conroy dep. p. 113).

55. Prior to presenting the school Program, Ms. Conroy or her staff meet with parents and give them an overview of the program. Parental consent is required for participation in the school program. Parental participation in the intoductory parent program is an integral part of the Program and is mandatory for grades kindergarten through eight. For upper level grades, parent sessions occur 50% of the time (Conroy dep. pp. 107, 130-131, 149).

56. When the first FLE curriculum has been presented in parochial schools, it has been given during regular school hours. It is given the majority of the time in biology or science classes. The teacher is not present during the St. Margaret's presentation, except at grade levels kindergarten and first grade, so as to relieve anxiety of younger students about strangers being in their classroom. (Conroy dep. pp. 105, 108).

57. When Ms. Conroy's staff presents the Church's teachings on abortion and contraception in the first FLE curriculum (grades 10 to 12), their purpose is informational. Ms. Conroy and her staff recognize that the adolescents will have to make their own decisions on abortion (Conroy dep. p. 185). The participants in the program

are not surprised to hear the information on the Church's teachings. (Conroy dep. pp. 185-186).

58. When Ms. Conroy's staff presents its materials on abortion, abortion is discussed in full. (Conroy dep. p. 185).

60. The discussion on abortion constitutes approximately 10 minutes of a six hour class presentation (Conroy dep. p. 188).

61. When an inquiry is made concerning the presentation of a program at a parochial school or parish, Ms. Conroy requires the organization to provide a donation to help defray the cost of the program. The donation can range from $200 to $1,000. The purpose of this requirement is to help the Program be self-sustaining, in recognition that Title XX funds eventually will not be available. (Conroy dep. pp. 191-92).

62. When an inquiry is made concerning the presentation of the program at a public school in the target area identified by the Title XX grant, Ms. Conroy does not charge for presentation of the program. (Conroy dep. *Id.*).

63. The donations by the parochial schools and parishes defray approximately 75% of the cost of the program (Conroy dep. p. 193).

64. The films used in the two FLE curricula are used in both public and parochial settings. They contain no religious references. (Conroy dep. p. 122).

65. Ms. Conroy and her staff use the FLE curricula for teaching, but do not disseminate the text of the cirricula to the participants. (Conroy dep. p. 187).

66. The first FLE curriculum was developed by Ms. Conroy as follows: grades 7-12, completed in 1980, grades K-6, 1982-1983. Revisions to the first FLE curriculum were made during the summer of 1982 and the summer of 1983. She developed the second FLE curriculum during the summer months of 1982 and 1983 for grades K-6, completing the curriculum by January, 1984. (Conroy dep. pp. 195-96, 155).

67. When Mrs. Conroy's staff present the Family Life Education program in parishes, clergy members do not usually attend the programs. If they attend, they do so as members of the audience, not as contributors to the program. Nor do such clergy members answer questions (Conroy dep. p. 143).

68. Ms. Conroy does not know the religious affiliations of the participants when the programs are presented in Catholic parishes. (Conroy dep. p. 140).

69. Ms. Conroy has given presentations concerning the Family Life Education program to various groups, including on one occasion the Somerville Ecumenical Clergy Association. That group is composed of clergy of various denominations. She received a donation for providing it to the Association. (Conroy dep. p. 163).

70. The 1982 St. Margaret's grant application indicates that a clergy program will be presented under the grant. No such program has taken place, however; nor has one been requested (Conroy dep. p. 158).

71. Ms. Conroy has taught segments of the Family Life Education Program to the adolescent girls in residence at St. Mary's Home. It was not presented at the Home itself (Conroy dep. p. 60). This occurred during only the 1982 grant cycle. The second FLE curriculum was used. (Conroy dep. p. 60, 110).

72. The residents of St. Mary's Home are now taught fertility awareness by a nurse who is not funded under the Title XX grant. (Fincke dep. pp. 57-59).

73. Ms. Conroy is developing a sex education program for parents, which has been funded and begun. It is a 12 hour course. Approximately 200 parents from four Catholic parishes have participated in it. (Conroy dep pp. 151-153).

74. Ms. Conroy is interested in presenting the program at more public schools. (*Id.* p. 190).

75. When it applied for funding in 1982, St. Margaret's sent a curriculum outline to HHS. That outline contained no religious references (A. 711433-711437). The grant monies provided in the first year were to develop a curriculum (Rosengard dep. p. 92-93).

76. On January 11, 1984, Ms. Fincke transmitted to Barbara Rosengard of OAPP, the Project Officer for the grant, the St. Margaret's Family Life Education Program curriculum. The curriculum sent was that for the public schools, the second FLE curriculum (Fincke dep. p. 17; Fincke Exh. 2).

77. Ms. Fincke reviewed the second FLE curriculum in December, 1983, prior to her transmitting it to OAPP (Fincke dep. p. 15).

78. The first FLE curriculum was not submitted to OAPP for its review and approval. Until December, 1983, Ms. Bouchard-Fincke was not aware that religious materials were contained in the Hospital's preexisting Family Life Education Program offered in parochial schools. (Fincke dep. p. 25).

79. While aware that the Hospital had a preexisting Family Life Education program functioning in parochial schools, Ms. Fincke did not consider it to be related to grant because the grant was not subsidizing the creation of that curriculum (*Id.* p. 17). She believed that the program was based on the same outline appended to the 1982 grant application, which she had reviewed (*Id.* pp. 15, 25).

80. Rosengard first learned of the first FLE curriculum in February, 1984, when Director Mecklenburg asked for all of the St. Margaret's curricula in HHS files. (Rosengard dep. p. 89).

81. Rosengard had made no inquiries about the second FLE curriculum while it was being developed. (Rosengard dep. p. 94).

82. Rosengard made a site visit to the Hospital in June, 1983. She visited the Hospital and accompanied

Ms. Fincke to a parochial school in the North End of Boston to observe a class in the prevention program, then visited other classes at the Hospital and its clinic. She also visited Boston Chinese YES, a subgrantee of St. Margaret's (Rosengard dep. pp. 95-96; Fincke dep. p. 25). No religious materials were being presented in the parochial school program during their visit. (*Id.*).

83. Rosengard did not review any curriculum materials during her site visit (Rosengard dep. p. 97).

84. On April 16, 1984, Director Mecklenburg sent a letter to the Administrator of St. Margaret's advising her that OAPP would not allow St. Margaret's to use Title XX monies to present the first FLE curriculum in the grant program. (A. 711438-711439).

85. On August 2, 1984, St. Margaret's responded to Director Meckenburg's letter and informed her that the Family Life Education program funded with Title XX monies would be presented only in public school settings. (A. 711440).

86. On September 12, 1984, Director Mecklenburg responded to this letter, clarifying that the Family Life Education program presented in parochial schools would have no relationship to the Title XX grant and that the curriculum to be used in public and private school settings would continue to be the second FLE curriculum (A. 711441).

Career Education Program

87. The second component of the prevention program has been a Career Education Program, administered by Ms. Fincke while she was Project Director. (See paragraph 90).

88. The program has been presented to elementary schools (parochial and public) in the Boston area. During the period October, 1982 to June, 1983, it was presented to

four parochial schools. During the period September, 1983 to April, 1984, it was presented to nine parochial schools, three public schools (a fourth had cancelled due to the departure of its own career education teacher), and one Family Y group. In order to achieve wider dissemination of the program in the public schools, St. Margaret's staff contacted the Boston Public School System's Institute for the Professional Development of Teachers and each of Boston's nine Community Superintendents. (A. 711442-711446).

89. The program's curriculum contains no religious references or materials. (A. 711216-711327). It is taught by two of St. Margaret's lay staff, Mr. Jay Lodie and Mrs. Bonnie Spendley. (A. 711447-711448). St. Margaret's transmitted its Career Education Program curriculum OAPP on February 1, 1984. (A. 711328). It was resubmitted to OAPP as part of St. Margaret's July 1, 1984 continuation application. (A. 711328).

90. The program is no longer part of the Title XX grant (Oct. 12, 1984 letter to the Hospital from OAPP, Attach. J. to Mechlenburg Dec., Oct. 22, 1984).

SeMO Association of Public Health Administrators, Inc.

1. The SeMo Association of Public Health Administrators, Inc. ("SeMo") was incorporated August 22, 1973, and is a not-for-profit Missouri corporation. (A. 705007) The Board of Directors is composed of the Administrators of five Public Health Departments in the Bootheel area. (*Id.*) The purposes for which the corporation was formed include the following:

1. to organize and educate the administrators of the health departments in the six-county region concerning the health needs and problems in the six-county area,
2. to cooperate with regional planning bodies in developing and implementing new health programs in the health delivery system for the six-county region,
3. to receive funds for the development and implementation of comprehensive health services on a regional basis, and
4. to enter into contracts for the implementation of health services (1982 application, Project Narrative, pp. 1-2, A. 705007-705008)

2. SeMo presently operates the following health service programs:

1. *SeMo Regional Home Health Agency* – Provides home care services to residents of the Bootheel counties.
2. *Bootheel Dental Health Project* – Provides comprehensive dental care to indigent children kindergarten care through third grade in mobile dental units located at elementary schools in three of the Bootheel counties, along with dental health education provided in the school setting.

3. *Women, Infants and Children Nutrition Program*—Nutrition education, counseling and food supplements to nutritionally or medically at-risk expectant mothers infants and children up to age five in all six counties of the Bootheel.
4. *Bootheel Maternal and Child Health Project*—Prenatal care through the county health departments to patients who have been unable to receive care from a physician.
5. *Bootheel Adolescent Family Life Project*— Community education, nursing follow-up with pregnant teens and adoption counseling.
6. *In-Home Service Program*—Provision of homemaker/chore and personal care services in the six counties of the Bootheel. (Personnel policies, eff. 8/18/83, *Preface*)

3. SeMo is not affiliated with any religious organization. (letter of 12/29/83 to Sanchez-Dirks, A. 705031). SeMo's services are made available without regard to race, creed or economic status. (Affidavit, Campbell) SeMo does not inquire as to the religious affiliation of clients or prospective clients. (*Id.*)

4. SeMo does not inquire as to the religious affiliation of employees or prospective employees. (*Id.*) In the employment of workers, "selection is made on the basis of merit and competence regardless of race, color, religion, sex, national origin or age" (*Id.*)

5. By application dated April 30, 1982, SeMo applied for $109,115 in Title XX funds for a demonstration project "to develop methodologies for the prevention of early adolescent sexual activity and teenage pregnancy in the rural setting." (1982 appl., A. 705006)

6. The 1982 application states that the goal of this project is:

> to demonstrate effective and acceptable strategies for preventing early and inappropriate adolescent sexual activity and teenage pregnancy in a highly conservative and religious rural area. The applicant's Board of Directors and management team share the conviction that the attainment of this goal is only possible with the full support and guidance of the community's most important social institutions—the family, the church and the school, with the family being the most important and critical to its success. (1982 appl., narrative, 20, A. 705009)

7. The 1982 application set out the following program objectives to achieve its goal.

1. To demonstrate the effectiveness of a family/church based approach to positive self image and sexuality training for adolescents as a means of preventing early sexual activity and teenage pregnancy
2. To demonstrate methods and techniques for increasing parental involvement and effectiveness in preventing adolescent sexual activity.
3. To demonstrate the effectiveness of intensive postnatal follow-up as a method of preventing subsequent adolescent pregnancies.
4. To demonstrate the efficacy of adoption as an alternative for adolescent parents and as a factor in the prevention of additional out-of-wedlock pregnancies through a program of positive peer influence and educational services.
5. To develop strategies for the accomplishment of the above objectives that can be effectively incorporated into the continuing function of community institutions such as schools, churches, social and health agencies following the termination of this project.
6. To develop and apply measurable evaluation criteria for each of the above objectives and the applicable action steps. (*Id.*)

8. In detailing the practical workplan for the demonstration project, SeMo outlined in their grant application that:

> Objective 1: To demonstrate the effectiveness of a family/church based approach to positive self image and sexuality training for adolescents as a means of preventing early sexual activity and teenage pregnancy.
>
> > Action 1: To develop and implement (from existing resources) parenting programs and youth development services designed to build self esteem in at least five different church and family settings with at least 50 youth ages 12 to 13 participating in a five year follow-along study.
> >
> > Action 2: To train instructors from area churches and assist them in establishing parenting and youth development programs with a goal of providing continuing services to at least 500 youth.
>
> Objective 2: Step 2: To sponsor and staff parent/child education seminars in area churches.
>
> > Action Step 3: To advocate and provide training for team youth counselors (man and wife) in area churches.
>
> Objective 5: To develop strategies for the accomplishment of the above objectives that can be effectively incorporated into the continuing function of community institutions such as schools, churches, social and health agencies following the termination of this project.
>
> > Action Step 1: Project staff will train permanent staff in area churches, schools and other institutions in the application of strategies with proven effectiveness.

(1982 appl. project narrative, A. 705010-705011)

9. According to the 1982 application, "Participation by families, religious and charitable organizations and other groups in the private sector is essential to the project's success. In fact, the very purpose of this project is to demonstrate that prevention of teen sexual activity and teenage pregnancy can be brought about through direct involvement by such groups." (*Id.*, 41, A. 705013).

10. By notice of Grant Award dated September 30, 1982, SeMo was awarded $100,000 under Title XX. (A. 705001)

11. By letter of October 19, 1982, SeMo's Executive Director reported the following to HHS:

> Although we only initiated our workshop program in late August, to date we are having tremendous success in selling these educational services to the conservative, fundamentalist community that has, in the past, been the most vigorous opposition to sexuality education programs. We are now negotiating to provide this preventive service to parents of Headstart children at eighteen different sites in our service area. The most encouraging thing about our success with the fundamentlists and headstart program is the probability that in working with these groups we will have the greatest opportunity to affect attitudes and actions in a population that, until this time, had not had access to these kinds of educational services.

(A. 705027)

12. The October 1982 report also stated that of four workshops scheduled after September 30, two were scheduled for churches, the First Baptist Church of Kennett and the Dexter First Assembly of God. (Oct. 19, 1982 letter, attachment, A. 705029).

13. The project, as implemented, has "three distinct segments": (1) sexuality education for parents, consisting of the workshops; (2) nursing follow-up; and (3) adoption counseling. (1984 application, narrative, 1, A. 705020).

14. By letter dated June 2, 1983, Patrict J. Sheeran of OAPP stated that:

> I was very pleased with the progress your project has made over the past seven months. Your project appears to be on target in meeting the objectives contained in your proposals. One of these objectives was to focus on families as the primary sex educators of their children. The project appears to be on target in meeting this objective. Your linkage with MCH/WIC programs is also commendable. As you mentioned, your program like many others is in need of help in the adoption area.

(A. 705014)

15. SeMo submitted an application for continuation funding in the amount of $100,000 on June 30, 1983. (1983 Appl. 1, A. 705015).

16. The Progress Report submitted with the 1983 application stated that, with respect to the project's first objective, from April 1983 on, 79 community organizations, consisting of 1275 individuals, participated in educational sessions. Of the 79 organizations, 25% were church or church-affiliated groups. The report further stated that the project had experienced no opposition from religious or other groups. (1983 appl, Progress Report, A. 705016). With regard to the second objective, the Report states that a three-part curriculum for parents had been developed, but not widely implemented. The third, fourth, and fifth objectives had not been fully implemented. (1983 appl., Progress Report, A. 705016-705018).

17. SeMo was awarded continuation funding in the amount of $100,000 by Notice of Grant Award dated September 30, 1983. (A. 705003). Condition #6 of the award required SeMo to submit its prevention curriculum to OAPP by December 31, 1983. (A. 705004)

18. By letter dated December 29, 1983, the Executive Director of SeMo submitted the prevention curriculum to OAPP for approval.

19. The curriculum for the parent sexuality education component of the project, is for a six-hour workshop and is divided into three sessions. The first session covers the following areas: (1) purpose of workshop; (2) why teach sex education; (3) why parents avoid sex education; and (4) four-point strategy to effective communication. The second session covers the following topics: (1) when should sex education begin; (2) talking to teens about sex; and (3) what every child should know about sex.[1] The third session covers the following areas: (1) film: "A Family Talks About Sex"; (2) applying the four-point strategy; (3) defining goals and action steps; (4) evaluation (*Id.*, A. 705034-705046).

20. The curriculum for the nursing follow-up component sets out the procedures of recruitment and provision of services to clients. (A. 705047-705048) Clients receive sexuality education and parenting education. (A. 705048) Birth control methods are provided, including birth control pills. (Curriculum, A. 705049).

21. For the period of January 1, 1983-November 30, 1983, the project provided informational presentations on teen preganancy to 2,042 adults and 536 adolescents; 37 adolescents were served as part of the Nursing Follow-up component of the project; 6 adolescents were served by the adoption component; and 82 parents were trained on the

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[1] Among the items listed in the curriculum section on "What All Children Should Know" was: "About All the Major Methods of Birth Control." The outline of methods of birth control covered the following topics with regard to each method: (1) how the method works; (2) how the method is used; (3) rate of effectiveness, (4) advantages and disadvantages.

Parent Sexuality Education Workshops. (A. 705032) Of the workshop participants, 50% were from civic-affiliated groups, 25% were from religious-affiliated groups and the remainder were affiliated with other types of organizations. (*Id.*, A. 705016).

22. By application dated June 30, 1984, SeMo applied for $85,740 in continuation funding under Title XX. (A. 705019) (1984 appl., p. 1).

23. The progress report states that a wide range of community groups have sponsored and participated in the parent education workshops. It attributes the "widespread support" of the program to the fact that "workshop leaders do not express or promote their individual values in the group setting and that the primary focus is to assist parents in becoming the sexuality educators of their children."(1984 application, narrative, A. 705021).

24. As of May 30, 1984, no community members had been trained to conduct the parent education workshops. In discusssing Objective 5, the 1984 continuation application states:

> The parent education workshop curriculum has been designed to stand alone and to be taught by lay educators with only minimal training. It is anticipated that a train-the-trainer model proposed for this and succeeding years will facilitate the development of trainers housed in local institutions who can continue this service long after the project is terminated.
>
> * * * * * * * * * *
>
> We anticipate the development of trained parent leaders in a variety of church, civic and social organizations in communities throughout the area, who within their own smaller population will be able to maintain this educational format over a long period of time. (1984 appl., narrative, progress report, A. 705022).

25. The proposal to train clergy in the 1982 application has not been implemented. (Aff., Campbell).

26. SeMo, as a matter of policy, does not permit the federally funded programs to be adapted by church organizations to the church teaching or doctrine or used as a platform for presentation of their teachings or doctrine. When particular churches have indicated that they would do this, SeMo has not presented its program through those churches. (Aff. Campbell).

Lyon County Health Department

1. The Lyon County Health Department ("Lyon County"), located in Emporia, Kansas, is a tax-supported health department which has no religious affiliation or mission. (A. 517022) Its governing body consists of an Emporia City Commissioner, a Lyon County Commissioner, and an Office of the County Medical Society. (A. 517032) Its purposes are: "wellness promotion, disease prevention, early intervention." It provides a range of nursing services, health education services, and environmental health services. (A. 517033)

2. Lyon County received $82,000 in Title XX funds for the period October 1, 1982-September 30, 1983 for a combination care and prevention services project. (A. 517034) The project was refunded for the following fiscal year in the same amount. (A. 517035)

3. The stated purposes of the project are:

(1) To find effective means of reaching adolescents utilizing the guidance and support available to them from parents and other family members.

(2) To promote prudent approaches to the problem of adolescent pre-marital sexual relations, including adolescent pregnancy.

(3) To promote adoption as an alternative for adolescent parents.

(4) To establish comprehensive integrated approaches in the delivery of care services for pregnant adolescents. (A. 517014)

4. Pursuant to a survey conducted in 1979, Lyon County developed a pilot program entitled "Growing up—A Good Time" ("GUAGT"). (A. 517036) The program was designed to provide a family-based sex education program for pre-adolescents, adolescents and parents. (*Id*).

5. With respect to prevention services, Lyon County proposed development of an expanded module on family communications, the decision process and parent-adolescent dialogue. (A. 517037) The proposed module would develop and expand the GUAGT program. (*Id*).

6. In the first grant year, the GUAGT curriculum was—

> greatly expanded. Material has been researched and rewriting has taken place. Facts about the adolescent's changing body feelings are primary information discussed through use of short lectures, questions and activities. Although a primary goal of the classes is to provide factual information, personal and group exercises in the areas of self awareness and esteem, value-setting, decision making and family relationships have been added to the curriculum. These exercises have been utilized in "GUAGT" classes already conducted, and serve as an aid in promoting the second major goal of the classes, increasing family dialogue. (A. 517038).

7. The philosophy of the GUAGT course states that:

> If a parent is able to communicate openly with his child about sexuality and development at an early age, then as the child enters adolescence he/she is more likely to approach the parent about information he needs. Especially since adolescence is often a time of frequent anxieties concerning oneself, it is a good time for the parent to have a backlog of communication. Of course, it is not possible to instruct in sexual growth and development, and, on the basis of knowledge alone, produce responsible behavior and self discipline. Family values, religious beliefs and the expectations of society must be included in promoting a healthy understanding of human sexuality.
>
> Therefore, to provide a more "complete" sexuality education, parents must be willing to share their values and beliefs with their children. This is the

"string that holds it all together," for without a basis and understanding of why, the factual knowledge can be interpreted in as many ways as there are individuals. (A. 517045)

8. The GUAGT facilitator's manual states, among the points facilitators presenting the course must remember, the following:

> (1) Stay objective. It is not a facilitator's option to judge, or recommend behavior on the basis of personal beliefs.
>
> * * * * *
>
> (7) Due to the nature of Adolescent Family Life Services and "Growing Up – A *Good* Time," we must require that you be a *facilitator*, presenting the class material contained within this manual, in the manner which we have set guidelines for. Any other material or presentation techniques not approved by Laura Pestinger will be unacceptable for "GUAGT." (A. 517053)

9. The section of the GUAGT facilitator's manual describing methods of contraception states:

> *Abortion*: Is the destruction of fetus before time of its birth. (Discussion is not included because it is *not* an option to consider. Decision about sexual activity must include acceptance of effects. *Abortion is not to be considered a form of contraception, and is only included here for reference in the case that a question is asked concerning it.*) (A. 517091)

10. One of the objectives of the 1982 grant application for the prevention component of the grant was an instructional package called "PATT" ("Parents and Teens Together"). However, it was subsequently decided not to implement this program. (A. 517001)

11. During the period October 1, 1983-May 31, 1984, 24 sessions of GUAGT were completed. Of the 17 sponsoring organizations presenting the program, two were religiously-affiliated: Sacred Heart Elementary School PTA and the Lutheran churches of Lyon County. (Progress Reports, A. 517015-517020)

12. According to the project director, where the GUAGT program is presented in public schools, the PTAs have selected public school settings. A group of classes was held in the health department lobby, where no religious symbols are displayed. The program at one local parochial school and a local Lutheran Church were held in rooms where religious symbols were displayed. (A. 517022)

13. An evaluation and summary report of the prevention program was prepared by eight members of the advisory board. The eight members consisted of a member of the Local League of Women Voters, a parent, a high school counselor, a Catholic Priest, two social workers, a nurse with the State Department of Health, and a local lawyer. (Progress Report of July 9, 1983, A. 517005-517013)

14. Under the care component, the following referrals were made in the period of April-June 1983: 9 to physicians; 12 to dieticians or WIC; 8 to social workers; 3 to S.R.S.; 1 to K.C.S.L; 1 to the Salvation Army; and 1 to Birthright. (A. 517039)

15. According to the 1982 grant application, under the pre-natal component of the care complement –

> Spiritual counseling will be promoted. Each pregnant adolescent and her family will be urged to make one formal contact with a church minister. (A. 517040)
>
> According to the project director, spiritual counseling is provided by referral, and only at the client's request to her choice of referral source. (A. 517023)

Tucson Unified School District No 1, Tucson, Arizona
Counterstatement of Material Facts

1. The Tucson Unified School District No. 1 ("TUSD") is a public school and, therefore, has no religious affiliation or mission. (A. 511005)

2. The Pima Associated Services for Adolescent Family Education Project ("PASAFE"), of which TUSD is the anchor agency, is a "collaborative entity formed of public and nonprofit agencies to develop and implement a comprehensive, integrated delivery system of care and prevention services to adolescents living in Pima County." (A. 511001)

3. TUSD contracts with six metropolitan based organizations to provide a comprehensive program of health, social, and educational services. These organizations include three health agencies: Pascua Yaqui Tribe Health Department, St. Elizabeth of Hungary Clinic, and El Rio Santa Cruz Health Center. Family social service agencies are Catholic Social Service, Jewish Family Service and Arizona Children's Home. The University of Arizona Health Services Center, Kino Community Hospital, and Pima County Health Department Clinic are used by PASAFE. The Teenage Parent Program of TUSD is an alternative school for pregnant and parenting youth and also provides prevention services. (*Id*).

4. The care component of the PASAFE project is designed to reduce the medical, psychological, social and educational risks of teen pregnancy, to help teen parents to prepare and implement future plans for about parenting or adoption, family living, education, career, and medical care, and to increase communication between diverse local cultures and service delivery systems to improve services to pregnant teens and their families and increase the speed and ease of referrals. (A. 511002)

5. The prevention component of the PASAFE project is designed to increase communication skills within the

family and peer groups, self-esteem, decisionmaking skills, value clarification skills, knowledge of adolescent growth and development, human reproduction, and sexuality, and awareness of family planning services. These objectives are accomplished by workshops and programs for parents, professionals, and children (A. 511003)

6. The St. Elizabeth of Hungary Clinic provides care services in the PASAFE program. It provides health care, counseling, and educational services. The clinic refers to and networks with a number of agencies. Students from TUSD's Teenage Parent Program receive health care at the clinic. Arizona Medicaid patients receive educational services at the clinic. Clients at the clinic are referred to Catholic Social Service for adoption counseling. (A. 511004)

7. The TUSD grant program has not provided any religious or spiritual services, lectures, or events. (A. 511005)

8. Although the official stand of Catholic Social Service and St. Elizabeth of Hungary Clinic is pro-life and anti-contraception other than natural methods, no materials are distributed or used which state this position. (*Id.*)

9. The agencies involved in the PASAFE program make available hundreds of filmstrips, books, pamphlets, booklets and other materials for teens, parents, and others on topics such as self-respect, stress, alcohol and teenagers, parents as sex educators, marriage, decision-making, biology, menstruation, human reproduction, family violence, pre-natal care, child care, single-parent families, parenting, childbirth, choosing doctors, child development, nutrition and baby foods. (A. 511009-511065)

Camden County Department of Health

1. Camden County Department of Health ("CCDH") received a grant under Title XX for the period October 1, 1982–September 30, 1983 in the amount of $420,000. (A. 522001) The grant was for a combination care and prevention services program (A. 522002) The grant was refunded for the following fiscal year in the amount of $420,000. (A. 522003)

2. CCDH is a public agency with no religious affiliation. (A. 522007)

3. The federally supported project consists of a coalition coordinated for the delivery of care and prevention services to adolescent and their families, with CCDH serving as the primary agency. (A. 522036) In addition, the following agencies provide services under the project: Rutgers University Regional Health Programs; JFK Memorial Hospital/University Medical Center; Osborn Family Health Center/Our Lady of Lourdes Medical Center; West Jersey Health System; St. John the Baptist Prenatal Clinic; Cooper Hospital/University Medical Center; Visiting Nurse and Health Association; Community Health and Nursing Services. (A. 522036) St. Johns' and Osborn are affiliated with the Roman Catholic Church (A. 522007)

4. The 1983 Progress Report states that the project would have a Community Advisory Committee, composed of at least 17 individuals as follows: (1) a County middle school principle who is very attuned to community needs and concerns and interested in family life education; (2) director of Planned Parenthood center serving County teens; (3) pediatrician who serves as a medical director of the County Office for Children; (4) mother of teenagers who volunteers for Contact, an emergency hotline; (5) director of YWCA daycare program for children of adolescent mothers; (6) social worker who works with the City Housing Authority and has lived in Camden City for

50 years; (7) leader of the Hispanic Community who works with the Puerto Rican Unity for Progress; (8) social service worker at the Children's Center who lives in a more rural portion of the County; (9) occupational health nurse residing in Merchantville; (10) bilingual lawyer who works with cases of child abuse and neglect in cooperation with the DYFS; (11) bank executive who has done volunteer work with Big Brothers and has two teenage sons; (12) director of the Black Peoples Unity Movement Daycare Centers who is a newly elected member of the City Board of Education; (13) priest who is Associate Director of the Youth Ministry for the Diocese of Camden and well known for his creative work with youth; (14) director of drug abuse program for teens; (15) two adolescent males (one from Camden City, one from Haddonfield; (16) adolescent female; (17) adolescent parent who has been through the Title XX program. Additional members will be added as needed. (A. 522040)

5. CCDH provides teacher training for family life education, classes for youth on sexuality and family life, and parent education workshops on communicating with children about sex. According to the project director, none of these programs has any religious orientation or content and religious or spiritual services, lectures or events have been provided as part of the project. (A. 522007)

6. The 1982 grant application states that "[d]iverse methods will be implemented to involve families, religious, charitable, voluntary organizations and associations in the family life/community training program." (A. 522038). Publicity for the program is to include brochures and posters as well as radio and television talk show programs. (A. 522039)

7. According to the project director, as part of the CCDH project's outreach program, letters have been sent to all county schools, institutions, agencies and clergymen

offering parent education workshops. (A. 522007) In addition, occasional presentations are made before church-related groups on topics of concern to the project. (*Id.*) None of these espouse, promulgate or support any religous philosophy, but deal simply with the content of family life education, prevention of adolescent pregnancy and related issues. (*Id.*)

8. The bulk of the CCDH prevention presentations under the grant have been made through County public schools, adult schools and professional agencies. (A. 522007) According to the grantee's 1984 progress report, in the period October 1, 1983-May 30, 1984, presentations were made to the teachers of 6 public schools, 23 presentations were made to students in public elementary, secondary and vocational schools, and 8 parent presentations were made in public schools. (A. 522032-522035)

9. St. John's and Osborn are care service sites. (A. 522015, 522025). CCDH's linkage agreements with them provide that they will perform the following services:

a. Provide pregnancy testing and maternity counseling, screening and treatment for venereal disease, nutrition information and counseling, prenatal and postpartum clinical services to pregnant adolescents 19 years of age or younger in accordance with the New Jersey Department of Health Publication "Standards for Prenatal Care Services" for a period extending one (1) year postpartum.
b. Provide said public health services in accordance with the "Primary Person Concept" as defined in the Camden County Adolescent Family Life Grant Application.
c. Provide directly all obstetrical services the CONTRACTOR is capable of providing and, where necessary, coordinate appropriate referrals to

other agencies for additional health and/or social services, if needed.
d. Provide, as needed, all necessary services for the delivery of patients in accordance with accepted medical standards.
e. Maintain an informational service and referral procedure to encourage private physicians, hospitals, and social agencies to refer appropriate cases to the prenatal clinic.
f. Provide for information and guidance on physical and emotional aspects of pregnancy, adoption, parenting, life planning through counseling, scheduling of home nursing visits, nursing conferences, and educational services involving both adolescents and their families as possible and appropriate. (*Id.*)

10. Both St. John's and Osborn provide secondary prevention services. (A. 522041). The Progress Report submitted with the 1983 continuation grant application states that Osborn and project staff have presented programs in "three catholic churches . . . (and) have visited 6 high schools, among them Camden County Vocational Schools. . . ." (A. 522041-522042). Other community visits have included "the Lighthouse Community group for pregnant teens, Planned Parenthood and Birthright." (A. 520042)

11. Although the 1983 Progress Report stated that St. John's was developing a Family Life Education program in conjunction with the Family Life Bureau of the Diocese of Camden, the 1984 Progress Report states: "St. John's preventive efforts take place primarily through one-on-one counseling." (A. 522037)

Maternal and Child Health, Department of Health, Hawaii

1. Maternal and Child Health, Department of Health, Hawaii ("MCH") received a grant under Title XX for fiscal year 1983 in the amount of $200,000 for a combination care and prevention services project. (A. 507001-507002)

2. MCH's 1982 grant application states that it is one of four branches in the Family Health Services Division of the Hawaii State Department of Health ("SDH"). (A. 507015) MCH administers the SDH's programs for family planning services, maternal and infant care, EPSDT, preventive health services to children 0-6, and pre-school developmental screening. (A. 507015-507017)

3. According to the 1982 application, "[t]he overall mission of the Hawaii Adolescent Family Life Project is to establish a statewide program to reduce teenage pregnancy through preventive and promotional activities and to assure comprehensive care services for pregnant adolescents." (A 507018)

4. MMCH was awarded continuation funding for the period October 1, 1983-September 30, 1984 in the amount of $60,000. (A. 507003) The prevention component of the project was defunded. (A. 507004) Because of delays in staffing, the prevention component did not initiate any activities to involve churches or religiously-affiliated groups, nor develop educational materials for such groups prior to defunding, according to the project director. (A. 507008)

5. As the MCH project has evolved it has developed primarily into a community-based system to provide services through a unified system of case management. (A. 507006, 507008). According to the Progress Report for the first three quarters of FY 83-84, the project accomplished the following tasks in that period:

1. Training of community committees to enable them to develop case management systems.

2. Community outreach to: (1) inform community agencies about project and community committees; (b) provide information regarding progress toward a case management system.
3. Establishment of the community committees as viable entities.
4. Progress by the community committees in developing case management models.
5. Development of the community committees' capacity to obtain independent funding. (A. 507012-507014)
6. The MCH project is not affiliated with any religious organization, has no contractual agreement with religious organizations, and has not presented any material or information, to or initiated correspondence with, such organizations. (A. 507006)

St. Mary's Hospital

1. St. Mary's Hospital, in Kansas City, Missouri, received a Title XX grant in the amount of $180,000 for fiscal year 1983. (A. 708001-708002) The grant was for a combination care and prevention service project. (A. 708002, Condn. #1). The care component of the grant was refunded for fiscal year 1984 in the amount of $155,000, and for fiscal year 1985 in the amount of $144,097. (A. 708003-708007)

2. According to the 1982 application, "the proposed project represents the joint efforts of four agencies operating under the administrative umbrella of St. Mary's Hospital." (A. 708008) Each agency was to perform services in its area of expertise. The four agencies, and their proposed services, were: (1) Guadalupe Center (community-based education, counseling and referral); (2) Catholic Charities (case management); (3) Adolescent Resources Corporation (preventive services and referral); and (4) St. Mary's (oversight, specialized obstetrical services). (*Id.*)

3. St. Mary's Hospital is an acute care private, nonprofit hospital owned by the Sisters of St. Mary. (*Id.*)

4. Guadalupe Center is a private, nonprofit, nonsectarian multipurpose center which serves westside residents of Kansas City. It provides services regardless of race or religion. (A. 708009)

5. Catholic Charities is a full-service social services agency, offering services to all persons in its service area without regard to race, color, sex or creed. (A. 708010)

6. Adolescent Resources Corp. is a private, non-profit organization the mission of which is to initiate, coordinate and strengthen services for adolescents in Greater Kansas City. (A. 708011)

7. The care component of the project provides the following types of services: outreach, intake, prenatal services, delivery and postpartum services, and case

management. (A. 708012) Basic concepts of natural family planning are taught as part of the postpartum care program. (A. 708013)

8. The cover letter accompanying the 1984-1985 Notice of Grant Award to St. Mary's required them to develop a plan by November 15, 1984 addressing compliance with condition #11 on the Notice of Grant Award. (A. 708014). Condition #11 of the Notice of Grant Award provides as follows: "The grantee shall assure the availability of care services as specified in the attached list either by direct provision or referral." (A. 708006) The attached list includes "Counseling and referral for family planning services." (A. 708007)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 83-3175

CHAN KENDRICK, ET AL., PLAINTIFFS,

v.

MARGARET HECKLER, SECRETARY OF THE DEPARTMENT OF HEALTH AND HUMAN SERVICES, ET AL.,
DEFENDANTS.

DEFENDANT'S STATEMENT OF MATERIAL FACTS PURSUANT TO LOCAL RULE 1-9(i)

* * * * * *

STATE OF LOUISIANA, DEPT. OF HEALTH AND HUMAN RESOURCES

1. The Women's Advocacy Bureau (WAB), a component of the Department of Health and Human Resources, State of Louisiana received a Title XX grant award for fiscal year 1983 for a care services program in the amount of $120,000. (A. 102001-102002) The grant was renewed for fiscal year 1984 in the same amount and was renewed for fiscal year 1985 in the amount of $102,000. (A. 102003-102005)

2. The WAB has established an innovative teen parent center that offers on-site family support and career planning activities and provides linkages to existing community health and social services providers. This care program, which provides services to a predominately black community, utilizes surrogate grandmothers to act as informal counselors and care givers. (A. 102022)

3. As part of its outreach efforts directed at the community, the Teen Center has sent letters to church leaders and many other community leaders informing them of the

Center's services. (A. 102007) The Center's Review Committee, composed of a cross-section of Baton Rouge citizens including school leaders, volunteer workers in young women's organizations, the media and church leaders review the Center's educational curricula before it is used. Another group composed of community and local business leaders, (*Id.*, A. 102008) The Friends of The Teen Parent Center, promote financial support such as requesting assistance for an emergency fund to meet extreme client needs by mailing letters to a variety of organizations, including women's service organizations, churches and synagogues. (*Id.*)

4. Through an agreement with the East Baton Rouge Parish School System, the project supplies an instructor and materials for General Equivalency Diploma (GED) instruction. The need for the GED class has been supported by consistently being filled to capacity with a current waiting list of 30 clients. (A. 102016-102017)

5. The Center has a linkage agreement with Catholic Social Services, Baton Rouge's only licensed adoption agency, in order to provide adoption counselling on an individual basis to the pregnant adolescents and teenage parents at the Center. (A. 102018)

6. The Center also has agreements with state funded and private nonprofit agencies to provide counselling in the areas of nutrition, parenting and mental health. (A. 102020)

7. Because the Center has developed a reputation as a place of effective care for adolescents through community support, clients are now coming from beyond East Baton Rouge Parish but are coming from Livingston and Pointe Coupee Parishes as well. (A. 102019) The project reported that in the period October 31, 1983-May 31, 1984 it served 239 new clients. (A. 102021)

8. As an agency of state government, the WAB has no religious affiliation and provides no religious or spiritual

lectures, services or events. (A. 102007) The project as a matter of practice does not conduct programs at churches or other religious institutions, although one presentation was made in a classroom at a parochial school. (*Id.*)

YWCA of Salem, Oregon

1. The Young Women's Christian Association ("YWCA") of Salem, Oregon received a Title XX grant of $138,041 for FY 1984 for a care only project. (A. 111001-111002) The grant was renewed for FY 1985 in the amount of $183,281. (A. 111003)

2. The YWCA is the nation's oldest and largest women's movement. The Salem YWCA was organized in 1914. (A. 111004) It is a volunteer membership organization, governed by a volunteer Board of Directors, representing diverse age groups, life experiences and culture, career, educational, ethnic and religious backgrounds. (*Id.*)

3. The YWCA has the following national goals, which, according to the project director, are a statement of the organization's roots, as well as its identity as a community service:

> *Purpose*: The Young Women's Christian Association of the United States of America, a movement rooted in the Christian faith as known as Jesus and nourished by the resources of that faith, seeks to respond to the barrier-breaking love of God in this day. The Association draws together into responsible membership women and girls of diverse experiences and faiths, that their lives may be open to new understanding and deeper relationships and that together they may join in the struggle for peace and justice, freedom and dignity for all people.
>
> And within that context our one IMPERATIVE: to thrust our collective power toward the elimination of racism whenever it exists and by any means necessary.

(A. 111005-111006)

4. The YWCA of Salem, Oregon also has the following local goals, adopted by its Board of Directors in 1978:

1. Development of leadership in teen women.

2. Support and broaden horizons of women wherever they are in their lives.
3. Increased intercultural and inter-racial participation and awareness.

(A. 111010)

5. The YWCA's membership is open to persons of any or no faith and the organization is not affiliated with any religion. (A. 111005-111008)

6. The project offers pregnant teens high school courses, prenatal and parenting classes, adoption services, individual and group counseling, child care, prenatal and well-baby services, family planning counseling, pediatric services, and vocational counseling. (A. 111011)

7. The project has no agreements with any religious institutions or organizations for services, programs or events. (A. 111007) No religious or spiritual services, lectures or events are provided as part of, in conjunction with or in cooperation with the project. (*Id.*) The project has made a presentation about the project on two occasions to the Salvation Army, and on one occasion has held a panel discussion at a statewide conference on family planning and sexuality which was sponsored by the County Health Department. (*Id.*) The conference was held in the auditorium of a local church and no religious symbols were displayed (*Id.*).

8. All project services are provided on-site by an interdisciplinary team. (A. 111012) In the first nine months of operation, the project served 380 individuals. (A. 111013) The majority of the pregnant adolescents served are age 17 and under, while the majority of adolescent mothers served are age 19 and under. (A. 111014)

Brigham Young University

1. In 1982 the Department of Family Services, Brigham Young University, applied for and received a Title XX grant in the amount of $179,437 to conduct a prevention program entitled "Family Centered Prevention of the Problems of Adolescent Sexual Activity." Def. App. 306001. This was supplemented by an additional $5,986 in August, 1983. Def. App. 306003. The grant was renewed in 1983 in the amount of $185,423, and in 1984 in the amount of $157,969. Def. App. 306005-306006.

2. The project is entirely administered and directed by Dr. Terrance D. Olson and Christopher M. Wallace, members of the faculty at BYU. Research evaluation is performed by Dr. Brent Miller of Utah State University. These individuals are not officials of the Mormon Church. Declaration of Terrance D. Olson, Project Director, ¶ 5.

3. Neither the Mormon Church, its officials, nor the BYU Board of Trustees has attempted to direct, control, or contribute to the decision making relating to the operation of the Title XX prevention project in any manner. Olson Dec. ¶ 2.

4. The Title XX project does not involve ministers or religious leaders in any way, including preparation, delivery or supervision of the program. Olson ¶ 5.

5. The focus of the project, according to the Project Director, Dr. Olson, is on moral development in the family context. Def. App. 306018-306019 (Olson, Wallace, Miller, *Primary Prevention of Adolescent Pregnancy: Promoting family involvement through a school curriculum*, accepted for publication in *Journal of Primary Prevention*, Vol. 5, No. 2 (1985) (at p. 3)).

6. The grant application states that the concept of morality taught is one where rules are not prescribed, but where universal principles such as honesty, compassion, and responsibility are examined in the everyday context of

personal integrity and family relationships. Def. App. ¶ 30612 (1983 Continuation Application at 24).

7. The project is being conducted in a eight public school districts in California, New Mexico, and Utah, which were approached by the project in order to obtain a diversity of cultural and geographic settings. Districts involved consented to participate in the project after public school district officials were informed of the purpose of the project and the content of the curriculum used in the project. Olson Dec. ¶ 6; Def. App. 306017 (April 27, 1983, Site Visit Report, p.14); Def. App. 30614 (1983 Continuation Application at 32).

8. With prior consent by public school officials and parents of children involved in the project, the project curriculum is presented to 9th, 10th, and 11th grade students as part of regular public high school courses in family life, health, or home economics classes. Olson Dec. ¶ 7; Def. App. 306012, 306015 (1983 Continuation Application at 30, 69).

9. The curriculum is presented to students by regular public high school teachers as part of their regular teaching assignments for the district. Def. App. 306012, 306015; Olson Dec. ¶ 7. Teachers already employed by the public school district volunteered to teach the curriculum after being trained in its use by project staff. No other personnel are involved. Olson Dec. ¶ 7.

10. During 1983-84, 38 public school teachers were involved in the project. Def. Aff. ¶ 30611 (1984 Continuation Application at 31).

11. Students were selected based on parental consent and their enrollment in existing high school courses. Olson Dec. ¶ 8.

12. Parental involvement is sought by referring students to their parents for discussion of the curriculum. Def. App. 306017, 306009-306011 (April 27, 1983, Site Visit Report at 2; 1984 Continuation Application at 25, 30-31).

13. The curriculum used in the project was received by OAPP prior to its use in the schools, in accordance with the OAPP's requirements. Def. App. 306008 (Staff Analysis of Renewal Application).

14. The prevention project curriculum does not contain references to any church, religious institution, or religious doctrines. Olson Dec. ¶ 9.

15. The project and the curriculum have not attempted to promote or inculcate moral or religious values of the Mormon Church or any other religion in any manner. Instead, the project attempts to teach people to make responsible choices based on concepts like justice, fairness, compassion and integrity. Olson Dec. ¶ 10.

16. The BYU demonstration project does not deal with abortion or abortion counseling. If the issue arises in class, teachers are instructed to discuss it in the same manner all other issues are addressed. Olsen Dec. ¶ 11.

EMORY UNIVERSITY

1. Emory University of Atlanta, Georgia, received a $99,971 grant for fiscal year 1984 for a prevention services project. (A. 312001-312002). The grant was renewed for fiscal year 1985 in the amount of $100,696. (A. 312003)

2. Emory University is a private, nonprofit corporation which is supported by and affiliated with the Methodist Episcopal Church, South. (A. 312004-312005)

3. This project is a prevention project which involves both parents and young people and is an attempt to find effective means within the context of the family of reaching adolescents before they become sexually active. (A. 312006) It consists of outreach services to families of adolescents to discourage sexual relations among unemancipated minors and through the educational project provides assistance to parents, schools, youth agencies and health providers enabling them to educate adolescents concerning self-discipline and responsibility in human sexuality. (*Id.*)

4. The project's prevention program was initially presented in the Atlanta public schools. (A. 312007, 312009) The Title XX grant permits an expansion of the program throughout the State of Georgia. (A. 312007) The goal of the project is to train over 900 people to present the prevention program, with the ultimate objective of reaching over 60,000 teens statewide by the end of 1986. (*Id.*)

5. At no time have the project's educational materials and promotional flyers, nor any portion of the program, made any mention of religious values or anti-abortion or anti-contraception references based on religious doctrine. (A. 312010)

6. Project Staff met with the Georgia Division of Public Health to work out ways in which the Public Health Division could assist in the dissemination effort. It was agreed that a letter would be sent from the state to all

health districts in the state explaining the effort and encouraging their participation. (A. 312011)

7. The grantee reported that in the first three months of training, 207 volunteers were trained. (A. 312012) Of the ten training workshops conducted as of May 1984, five were sponsored by local health districts, one by a Methodist Church, one by a Baptist Church, two by private social agencies and one by a retired school teacher. (*Id.*)

YWCA of St. Petersburg, Florida

1. The YWCA of St. Petersburg, Florida, received a Title XX grant for FY 1983 in the amount of $70,000 for a combination care and prevention services project, Project H.E.L.P. (A. 509001) The grant was renewed for FY 1984 in the amount of $70,000 for care services only and for FY 1985 in the amount of $69,000 (A. 509003-509005)

2. The YWCA of St. Petersburg is a private, nonprofit corporation which was formed approximately 60 years ago. It is governed by a Board of Directors composed of influential business and civic leaders, 75% of whom are working women. (A. 509006-509007)

3. The statement of purpose of the national YWCA organizations provides as follows:

> The Young Women's Christian Association of the United States of America, a movement rooted in the Christian faith as known in Jesus and nourished by the resources of that faith, seeks to respond to the barrier-breaking love of God in this day.
>
> The Association draws together into responsible membership women and girls of diverse experiences and faiths, that their lives may be open to new understanding and deeper relationships and that together they may join in the struggle for peace and justice, freedom and dignity for all people.
>
> **ONE IMPERATIVE**
>
> WE MOVE to reaffirm our one Imperative: to thrust our collective power toward the elimination of racism wherever it exists and by any means necessary.

4. In addition, the St. Petersburg YWCA has the following local goals:

> The promotion of total health and well-being to assist in the attachment and maintenance of a healthful life-style, both physically and emotionally, through activities, services and provision of health education.
>
> Optimal opportunity for the acquisition of knowledge and skills. To provide opportunities for increasing knowledge and skills to enhance participation in all aspects of society through classes, special events and programs.
>
> Optimal personal and social development. To promote conditions conducive to maximum personal, social and physical development through individual and group classes, special events and service, and interest groups.

(A. 509006)

5. Project HELP is a cooperative effort administered by the St. Petersburg YWCA. The health services component is provided primarily by the Pinellas County Health Department, and counseling services by Family Service Centers (A. 509012). The project is supported by multiple community agencies, including the county juvenile welfare board, the city of St. Petersburg, and the county school board. (A. 509011) The project had one agreement with a local Methodist Church, which was solely for rental of space for a nine-month period. (A. 509008-509009)

6. The project provides educational services, life skills education, counseling services, health services (including pregnancy testing, family planning, pre- and post-natal care, and pediatric services). Parenting education and community educational services are also provided. (A. 509012-509013)

7. From October 1, 1983 to May 31, 1984, 154 adolescent girls, 40 fathers and 119 infants received services. The project made 146 community education presentations to community organizations in that period. Agencies receiving the presentations include youth homes, a runaway shelter, girls and boys club, after-school and in-school programs. (A. 509014-509015) In the past 2½ years of the

project, several churches have also received such presentations; none of the presentations involved any discussion of religion. (A 509008-509009)

8. No materials, slides, tapes and recordings used by the project contain any references to religion and any anti-contraception or anti-abortion references. (*Id.* The project has presented no religious or spiritual services at any time. (*Id.*).

9. Project HELP was donated $1,000 by a coalition of churches. No religious involvement occurred between the project and the coalition, and the money was used for nursery supplies and infant clothing (*Id.*).

10. The extent of the project's contact with religious organizations has consisted solely of the rental agreement described in paragraph 5, publications in church newsletters and bulletins describing the services available from the project, and appeals for donations. (*Id.*).

Grant Reader's Evaluation of San Diego University Foundation's Application

3. The applicant's project narrative describes a work plan which is comprehensive, clear, innovative, of high quality, feasible, has the potential for attaining the project's objectives, and appears worthy of replication. (45 points)

Work Plan is clearly stated, solidly based on underlying structure in Family Life Ed. Lacks major discriminatory factors discussion on which factor in curriculum might have most profound effect on modifying behavior (sexual activity rate); no discussion of moral values or spiritual development during teen years and adult human life cycle. No research plan to do indepth (all ____ etc.) or even "church-attendance" level assessment of previous and post-intervention level of moral and spiritual development on activity rate.

This is the project's biggest weakness. It has great structure, but its thrust and substance of its *preventive* effort is not well described nor compelling in its possible effectiveness.

Grant Reader's Evaluation of Baltimore City's Application

2. The applicant's presentation of the project's objectives, methods for achieving them, and results or benefits expected demonstrate a clear understanding of the purpose of the demonstration program (10 points)

There is missing a decided pro-life commitment in this proposal even though there is an obvious effort to present all alternatives to unwanted pregnancy.

The objectives are clear and the methods are certainly well devised to meet those stated goals and objectives. It is an excellent proposal in an urban area where teenage pregnancy and v.d. are at epidemic stage. This influences the high rating of the proposal which is thorough, professional, and workable. Lacking is the kind of counseling that you get in Catholic Social Service for example.

Also lacking is the matching dollars from the private sector and much of the volunteerism in private programs.

Other than that, it is a comprehensive public health program that should "fly".

Circle appropriate score:

Missing	Poor	Fair	Average	Good	Excellent
0	1 2	3 4	5 6	7 8	9 10

Grant Reader's Evaluation of Application of Catholic Diocese of Memphis

Missing	Poor	Fair	Average	Good	Excellent
0	1 2 3	4 5 6	7 8 9	10 11 12	13 14 15

× 3 = 24

3. The applicant's project narrative describes a work plan which is comprehensive, clear, innovative, of high quality, feasible, has the potential for attaining the project's objectives, and appears worthy of replication.

This is a very professional proposal in a social service/mental health mode. The need is well addressed, and it is anticipated that the majority of clients will be black and poor. Support letters reinforce the need for coordination of services. The agency recognizes the need for strong recruitment—counseling agencies don't draw as well as schools or medical facilities. What besides the initial contracts will cement client/agency relationships? What responsibility will agency assume for those who drop out? This is not addressed.

There are mixed messages on coordinatio —the agency will expect referrals from the broad spectrum. But the agency will use mainly the Catholic institutions it is already working with (excluding the University of Tennessee) for referrals which is somewhat limiting. They

will also teach only natural family planning, a method which *should* be taught, but which many professionals agree is too complicated for immature or retarded youth. This also raises the ethical question of imposing the church's belief on those of different faiths with public money. The follow-up for six weeks post partum is inadequate.

Mr. Ernest Peterson
Office of Adolescent Pregnancy Programs
6th Floor, Reporters Building
300 7th St., SW
Washington, DC 20201

Dear Ernie:

I have intended, since I summarized reviewers' comments last fall, to share with the Office some very deep concerns I have about the review process. Since we now have a new round of proposals due June 6, I feel that it is time that I express my concerns.

* * * * *

Ga—Proposal #021: Scored an application low because "No experts on transcendental (the most effective) Judeo-Christian values is represented in the development or teaching of this proposal". What would happen if the ACLU got hold of that comment!

There a number of good reviewers, including Ro, Ed, Ds, St, and Ga. With the smaller number of proposals ex-

pected this year, I would hope the Office would use only knowledgeable, experienced, demonstrably good reviewers.

I hope you find these comments helpful!

Sincerely,
GAS
Program Coordinator
New Futures School

CG: pl
cc: Patrick Sheeran

Excerpt from Catholic Family Service, Amarillo, Grant Application

Care Services to be Provided:

a. Pregnancy testing will be provided at the first interview by an intake worker who is also a Licensed Vocational Nurse. Maternity counseling will be done by the assigned Caseworker.

The primary focus will be to help the client cope with the pregnancy and solve the resulting problems. The agency will offer a discussion of the various alternatives open to the client (i.e. abortion, adoption, parenthood as a single parent or a married parent), with an emphasis on what realistic outcome and expectations a client may have from each option.

The client will not be counseled to terminate the pregnancy, although caseworkers do discuss a client's feelings about abortion and the detrimental effects abortion can have on the physical and emotioned well-being of the client, as well as the destruction occurring to an unborn infant. An effort is made not to put heavy guilt feelings on the client, but to have the client see that the expediency of an abortion does not out-weigh the other consequences.

NOTICE OF GRANT AWARD (Continuation Sheet)

Item No.

REMARKS—Other Terms and Conditions

1. The grantee shall comply with the regulations applicable to demonstration grants under Title XX of the Public Health Service Act when such regulations are published.

* * * * *

10. The grantee will not teach or promote religion in the AFL Title XX program. The program shall be designed so as to be, to the extent possible, accessible to the public generally.

Excerpt from St. Margaret's Grant Application

* * * * *

PART 2

Teenage extramarital pregnancies poignantly illustrate a great challenge to the family—the separation of reproduction from marriage. If a breakdown in family life is occuring in contemporary times, this may well emanate from a widespread ignorance of the rules, attitudes and commandments related to both Jewish and Christian home life and to the sexual relationship. Families are familiar with the "ascetic ideal"; they have come to know the "hedonic ideal" inherent in the secularism of today; but they remain sadly ignorant of the ideal of holiness inherent in the basic tenents of Judeo-Christian beliefs.

The Bishops of the United States have designated the 1980;s as the *Decade of the Family*. Pope John Paul II has stated, "The pastoral intervention of the church in support of the family is a matter of urgency." He also has emphasized, "Every effort should be made to strengthen and develop pastoral care for the family which should be treated as a real matter of priority".

Parents' responsibilities to carry out their roles as carriers of life and that of their childrens' first teachers are enormous. To establish a viable unit showing genuine concern for one another is not easy. To be responsible parents requires not only a firm personal and spiritual commitment, but also preparation through education and support systems which are committed to today's families.

Spiritual guidance is essential to maintain spiritual purity. Families must once again develop respect for their own integrity. There is an urgent need for reappraisal of the role of religion, and it must be within the family where any religion must be taught if it is to endure.

The chaplain of St. Margaret's Hospital will draw together an ecumenical group from the grants target area and surrounding communities served by the hospital. The purpose of this meeting will be to discuss the services offered at the hospital through its teen pregnancy program particularly the Family Life Education Program. The Family Life & Sex Education course described in Part I of the Preceding Section, will be offered to the clergy at their scheduling convenience.

There are *three* purposes for this. First the clergy who has never been educated in this area will be able to communicate more freely with their congregations. They will be better able to give spiritual support so often necessary to families with adolescent children. The fact that the 80's has been declared the decade of the family places the emphasis correctly. However, without the proper training religious leaders have been unable to deal with the modern day problems of family life, particularly adolescent sexual activity. The course offered through the Family Life department of St. Margaret's Hospital provides the training these leaders will need.

Secondly, the religious leaders will be expected to go back to their congregations and encourage them to also take the course. Staff from the family life education program will go to the church or temple and present the course on that site. Third, religious leaders to whom congregants often go when there is a crisis in the family will be aware of the services offered through the teen pregnancy program at St. Margaret's Hospital. Knowing that there are trained staff read to help will ease the immediate crisis for that family.

DEPARTMENT OF HEALTH & HUMAN SERVICES

Public Health Service
Office of the Assistant
Secretary for Health
Washington DC 20201

April 16, 1984

Sister Kathleen Natwin
Administrator
St. Margaret's Hospital
90 Cushing Avenue
Dorchester, Massachusetts 02125

Dear Sister Kathleen Natwin:

As you know, this Department is currently defending a legal challenge to Title XX of the Public Health Service Act, *Kendrick* v. *Heckler*, Case No. 83-3175, D.D.C. The plaintiffs charge, among other things, that the Title XX program as it is being implemented by certain grantees (including St. Margaret's), violates the provision of the First Amendment that prohibits the Government from establishing religion. As you are also aware, in the course of defending the lawsuit, we have had occasion to look particularly closely into St. Margaret's Title XX project. While we continue to be very impressed with the project as a whole, we now find that one aspect of the Family Life Education component of the project raises troublesome issues of potential Federal funding of religious activity. Therefore, I am writing to explore with you ways in which we may resolve this problem.

It is my understanding, based on information provided by Mary Conroy, Director of Family Life Education, in the course of her deposition in *Kendrick*, that the Family Life Education component of the project provides instruction to parents and students in public, parochial, and private nonsectarian school settings. The curriculum used in those

settings is in major respects the same. However, the curriculum used in the parochial schools—which was neither submitted to nor approved by this Department for use in the project as required in the grant award—contains religious references and various Catholic Church teachings. We understand further that the curriculum is on occasion taught by the four health educators on your staff whose salary is wholly borne by the project. Since apparently the majority of the Family Life Education activity under the project has occurred in parochial schools, we assume, based upon our present information, that a substantial part of the other direct costs of the prevention component (travel, supplies) are directly attributable to the parochial school activity, even though some costs are defrayed by honoraria or stipends given to you by the parochial schools.

The use of Federal funding to teach or promote the views of a particular religion is impermissible under the First Amendment. We think you will understand our concern, therefore, with the parochial school portion of your Title XX project as it is presently constituted.

Under the present arrangement, Federal funds are susceptible to being used to advance particular teachings of the Catholic Church, a situation which cannot continue. Accordingly, the parochial school portion of your project must be altered, with, at a minimum, discontinuation of the curriculum presently in use in the parochial schools to the extent those schools are a part of the project. Furthermore, costs incurred in connection with that aspect of the project are unallowable and may not be charged against the Federal grant.

I recognize that there may be a number of solutions to the problems outlined above, and we are open to suggestions as to how to resolve them. Toward that end, I urge you to contact Barbara Rosengard of this office at 202/245-7473. I look forward to hearing from you at your earliest convenience.

Sincerely yours,

Marjory E. Mecklenburg
Deputy Assistant Secretary
for Population Affairs

cc: Frances Kellogg, Project Director

ST. MARGARET'S HOSPITAL FOR WOMEN

90 Cushing Avenue
Boston, Massachusetts 0??25
Telephone (617) 436-5600

August 2, 1984

Ms. Marjory Mecklenburg
Deputy Assistant Secretary
for Population Affairs and
Director of the Office of
Adolescent Pregnancy Programs
Department of Public Health and
Human Services
Washington, D.C. 20201

Dear Ms. Mecklenburg:

I am writing in belated response to your April letter with respect to the current grant to St. Margaret's Hospital for Women under the Adolescent Family Life Act.

Given the pendency of the present litigation, I had referred your letter to Counsel for the Hospital prior to preparing a substantive response. I have been advised by Counsel that it is appropriate, at this time, to formally respond to your original inquiry.

I am able to advise you that St. Margaret's Hospital for Women is currently able to provide expanded program services in public school settings such that the federal grant funds will be utilized solely in the public school settings.

If I can furnish you with any further information in this regard, please don't hesitate to contact me.

Sincerely,

/s/ SISTER KATHLEEN NATWIN

Sister Kathleen Natwin
Administrator/CEO
for Population Affairs

Cc: Mary Conroy
Barbara Rosengard
Wilson D. Rogers, Jr.
Fran Kellogg

ARCHBISHOP WILLIAMS HIGH SCHOOL –
GRADE 12
EVALUATIONS – OCTOBER 1981

DO YOU HAVE ANY COMMENTS OR SUGGESTIONS?

* * * * *

19. I don't think they should try to discourage kids from using birth control because the Church says not to. Some kids have made mature decisions and dwelling on what the Church says may give them a guilt trip.

* * * * *

41. More information on birth control, but not how the church feels.

* * * * *

50. The most effective birth control other than what the Church approves of. She spent so much time on the natural family planning (rythm method) as a good thing because the Church approves it but she failed to mention that it is not good for teenagers to use this method – it's not really safe.

APPENDIX B
PAGE 2

ARCHBISHOP WILLIAMS HIGH SCHOOL –
GRADE 12
EVALUATIONS – OCTOBER 1981

* * * * *

41. More information on birth control, but not how the church feels.

* * * * *

50. The most effective birth control other than what the Church approves of. She spent so much time on the natural family planning (rythm method) as a good thing because the Church approves it but she failed to mention that it is not good for teenagers to use this method – it's not really safe.

Family Life Department
Course Outline for Grade Nine

Films: Leo Beverman
"Love Slides"
"Abortion Slides"

Last year the students were given a course on "sexuality" by the science staff at school. One of the purposes of this course was to present the Catholic moral philosophy teaching regarding love, birth control, abortion. One of the students commented—"Last year we were told *facts*, but this course gave us some opinions—morals."

AFFIRMATION IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

I, Louis Laz, M.D., declare the following is true under penalty of perjury:

1. I am a medical doctor currently practicing obstetrics and gynecology with the Affiliated Neighborhood Health Centers of Boston, Inc., Ob.-Gyn. Group, affiliated with Boston City Hospital, 818 Harrison Avenue, Boston, Massachusetts 02118. I worked at St. Margaret's Hospital in 1978-1980 as a medical student from Tufts Medical School, and I was an intern and resident physician at St. Margaret's from July 1980 to June 1984.

2. I am making this affirmation in support of plaintiffs' motion for summary judgment because, based on my experience at St. Margaret's, I believe it is a pervasively religious institution whose rendition of medical care is dictated by Catholic religious directives which are often counter to the patients' best medical interests, the current standard of medical care as practiced in secular institutions, and medical ethics. Further, teenage patients in St. Margaret's Teenage Pregnancy Program (TAPP), funded under the Adolescent Family Life Act (AFLA), receive skewed, misleading and sometimes erroneous medical information in order to directly promote moral "choices" consistent with Catholic beliefs, and only receive those medical procedures which comply with the hospital's religious directives. The federal funding which goes to St. Margaret's, including the AFLA grant, directly furthers the religious mission of St. Margaret's Hospital.

3. St. Margaret's is a Catholic hospital run by the Archdiocese of Boston. It is not a general hospital, but rather a specialized hospital for women, providing obstetrical and gynecological care.* This fact is critical to how pervasively religious this hospital is since the religious directives to

---

* St. Margaret's does have a small pediatrics (neonatology) department to treat newborns. But this service is auxiliary to its obstetrical care.

Catholic hospitals govern the area of reproductive health care most thoroughly and interfere with the secular practice of medicine.

4. St. Margaret's is the major obstetrics hospital affiliated with Tufts Medical School. At all times there are about 9 out of 20 resident physicians from Tufts at St. Margaret's. The resident physicians provide nearly all the care for the St. Margaret's clinic patients which include all the teenage patients in the TAPP program. St. Margaret's serves a large catchment area and the patients are largely low-income or Medicaid-eligible.

5. All new resident physicians at St. Margaret's are given a booklet entitled "Ethical and Religious Directives of Catholic Facilities" (Exhibit A). This booklet sets forth the Catholic position governing medical care (largely in the reproductive health area) required to be followed by Catholic hospitals. I was informed by Dr. Edward Kelley, the Medical Director of St. Margaret's on several occasions, that these religious directives govern patient care at St. Margaret's and if they were not followed, doctors could be fired. I was also told that the reference to "policies, rules and regulations" in my contract with St. Margaret's (Exhibit B, para. 4) meant that I must agree to obey the religious directives, as outlined in the "Ethical and Religious Directives".

6. The imposition of these religious directives caused me great conflict at St. Margaret's, since furthering the religious mission of the hospital was very frequently in conflict with my ethical obligation to render the best medical care for my patients. Some of the following are ways in which the religious directives are contrary to the prevailing medical standard of care for patients.

A. It is basic to good medical care that the physician give the patients full informed consent prior to any medical treatment. Full informed consent means knowledge about all the medical options available and the risks and benefits of choosing one course of treatment over another. Patients at St.

Margaret's are not given informed consent. The religious directives forbid doctors at St. Margaret's from performing, prescribing, recommending or even referring for sterilization, abortion or contraception, even though these options are critical for the vast majority of obstetrical or gynecological patients. Patients are never told prior to accepting care at St. Margaret's that regardless of their personal choice or health needs, they will never receive these procedures, or referrals, or be counseled in all available medical options. St. Margaret's has Haitian, Southeast Asian, Hispanic, and other non-English speaking patients who do not even know that abortion or sterilization are legal options. And, no matter what strain on their health and life their pregnancy might present, they will not find out about these options.

B. Medical personnel at St. Margaret's are required to treat the embryo as a person from the moment of conception (Exhibit A, p. 7) regardless of whether this belief is shared by the woman, her doctor, or other persons treating her. For this reason, doctors at St. Margaret's are not allowed to do abortions, discuss the abortion option, or make abortion referrals. The fetus or embryo is treated as a separate human patient whose treatment often imperils women's health and lives. For example, doctors cannot follow federal F.D.A. regulations which require that women who are pregnant with an I.U.D. in place be told about abortion as an option. This regulation exists because continuing the pregnancy with the I.U.D. carries with it a 50 times higher risk of death (Exhibit C). Teenagers are not informed that an abortion is many times safer for them, in terms of risks to their lives, than continued pregnancy and childbirth. Women who have added childbirth risks imposed by cancer, heart problems, extreme obesity, lupus, diabetes, sickle

cell disease, mental conditions, hypertension, to name a few, are never informed about abortion which might be medically indicated.

C. The religious directives forbade us to make abortion, sterilization or contraception referrals because to do so constitutes "material cooperation" with a sin. One of my patient's illustrates how this directive undermines patient care. Betty D. was a drug addict who came to St. Margaret's with a suspected ectopic pregnancy. Evaluation revealed a normal intra-uterine pregnancy. She had had multiple earlier pregnancies, was a drug addict, and wanted an abortion. She had been an intravenous drug abuser for so long that she had no easily accessible veins left. I felt it was medically imperative to refer her for an abortion because to send her out to find her own abortion was dangerous since a clinic might not be able to handle any emergency that might require a blood transfusion. She went into severe drug withdrawal at St. Margaret's and could not be medically discharged. I made an appointment for her to have an abortion at the New England Medical Center, and tried to get St. Margaret's to send her there in an ambulance. Irene Kilroy, the nurse in charge of gynecology at St. Margaret's, refused to call the ambulance because I was going to transfer her for an abortion. She said to do so was against Catholic doctrine, that it would be "material cooperation" in an abortion, and the policy of St. Margaret's was to prevent abortions whenever—even if such an abortion was medically necessary. (See Exhibit D., referral policy).

D. Because of the religious directives, even life-saving abortions are put off as late as possible, disregarding the patient's choice and the doctor's best judgment. Physical and mental risks to the woman are

allowed to increase in order to promote fetal protections. To promote the belief in the personhood of the fetus, St. Margaret's has a rule that doctors cannot declare a fetus dead without two proofs, one week apart. This has nothing to do with medicine or science, since there are many new ways of medically proving the death of a fetus, but goes to the extreme to preserve fetal life regardless of the woman's or her doctor's choices. The week delay is not followed by any secular hospital that I know of and ignores the medical state and conscious choice of the woman.

E. The treatment of ectopic pregnancies, that is, when an embryo is implanted in the fallopian tubes instead of the uterus, is governed by the religious directives. (Ex. A, p. 8). The embryo cannot come to term and can, if untreated, grow and rupture which can lead to intraabdominal hemmorhage and even death. Even if a woman has an ectopic pregnancy, it was the written policy of St. Margaret's to have doctors wait until the Fallopian tube actually ruptures, rather than most fully protecting a women's life and health by removing the pregnancy. We were forced to do procedures which were contrary to medical standard of care. Often it is difficult to diagnose an ectopic pregnancy. If a woman has a positive pregnancy test and wants an abortion, and if the location of the pregnancy, ectopic or intrauterine, cannot be determined preoperatively, then the recommended sequency of events would be to do a diagnostic dilation and curettage of the uterus. (D & C). If the tissue revealed a pregnancy, then there is no need to do the more risky laparoscopy with examines the fallopian tubes for a total pregnancy. Since a D & C is an abortion, this sequence of diagnosis was not

allowed at St. Margaret's. Women had to undergo the much more risky laparoscopy.

F. Ammiocentesis is a standard diagnostic procedure used to diagnose genetic defects in the fetus. It is used by high risk women, i.e., older women or those who run particular genetic risks. Because this procedure can result in a woman choosing abortion, St. Margaret's tried to get all doctors to require "prolife" consent forms be signed by anmiocentesis patients. The only basis for this form is religious and the coercion on the patients was protested by the resident physicians.
(Exhibit E).

7. The resident physicians supervise the midwives who provide most of the direct prenatal care for the teenage TAPP patients. However, the physicians see the TAPP patients at least three times during their pregnancies and care directly for those "high risk" patients.

8. Although the AFLA permits grant recipients to give or refer for contraceptives with parental consent, and to make abortion referrals upon parental request, we were not told about this exception and it was made clear that such referrals would violate St. Margaret's religious directives. We could never discuss abortion even with those TAPP patients with medical conditions that heightened their already existing risks.

9. There is a pervasively religious atmosphere at St. Margaret's Hospital which patients cannot help but notice and be influenced by. This is particularly true of the TAPP patients since some of them live at the St. Mary's Home, which is part of the St. Margaret's complex which contains a residence and school for the girls. These teenagers are very unsophisticated, young (my youngest patient was 11 and many were 13 or 14), poor, and vulnerable. Many have never had a pelvic exam. They are completely ignorant of outside community resources and

once at St. Margaret's become very dependent on the medical, psychological and educational care. Even those teenage TAPP patients not in the residential program come for frequent visits and counseling. For all of these reasons, considering their vulnerable, dependent and sometimes desperate situations, St. Margaret's as an institution influences teenagers in the same way a parochial school does—and in fact, TAPP residential teenagers *do* go to school there.

10. The religious nature of the hospital is shown by religious symbolism throughout the hospital, including

1. A "circle of life" on top of the hospital
2. St. Mary's Home, the residence of TAPP patients and where all TAPP prenatal clinics are held has religious statues in the courtyard where the teenagers eat lunch.
3. There are crucifixes in the delivery rooms, and, until recently, in the labor rooms. Some of the examining rooms also have crucifixes (Ex. E.).
4. The P.A. system makes public announcements of prayer. Until 1982, a prayer went over the loudspeaker every morning reaching all patients. There are mass announcements and a Catholic chapel on the premises.
5. All babies born premature or stillborn are baptized in the delivery room regardless of the religious preference of the mother and regardless of her lack of knowledge or consent.

11. I have examined the curriculum taught by the Family Life Services Department funded under the AFLA grant. The sections on family planning and abortion are biased, misleading, and contain many medical inaccuracies. The medical inaccuracies and deliberate omissions in the curriculum are designed to discourage the use of contraceptives and abortion. This curriculum is clearly designed to promote Catholic doctrine which believes con-

traception (except for natural family planning) and abortion are a sin. While it purports to give teenagers factual information, it does not do so, nor is there any way for these teenagers to find out they are being given erroneous medical information. Some of the errors or critical omissions include:

A. The curriculum which is to teach biology and sex education is permeated with religious references to God and Christianity, i.e., Catholic interpretation of marriage, sex, family life and contraception. For example, at 9-14 the description of conception and birth states that at the moment of conception only God is aware that life has begun. Obviously that is not a fact which doctors are aware of or, for some, even believe in.

B. The section on family planning and contraceptives for teenagers includes (see pages 2-9 Documents 5069-5076) seven pages on natural family planning, and four pages on other methods of contraception. The curriculum does not mention that this is not a method that has ever been successfully used among teenagers. Teenagers and other women who have irregular menstrual cycles or a history of anovulatory periods are unsuited for all natural family planning methods of contraception. AGI, *Making Choices*, p. 8 (1983). Nor does it mention the high failure rate, approximately 24% for all users. AGI, *Making Choices*, p. 8, 28 (1983). The natural family planning methods' failure rate is lowest among highly motivated couples. *See* Rice, Lanctot and Garcia-Devesa, "The Effectiveness of the Sympto-Thermal Method of Natural Family Planning," paper presented at the first general assembly of the International Federation for Family Life Promotion, Cali, Columbia, June 22-29, 1977. To my knowledge, none of my single St.

Margaret's teenage clients have ever taken the natural family planning course offered there.

C. In the discussion of the birth control pill the curriculum lists as a side effect cervical cancer, although this has never been scientifically proven. Rosenfield, "The Pill: An Evaluation of Recent Studies", *The Johns Hopkins Medical Journal*, 150: 178 (1982); Ory, Rosenfield and Landman, "The Pill: An Assessment," 12 *Family Planning Perspectives*, 280 Nov/Dec (1980). The majority of scientific studies found no increased incidence of ovarian, uterine and breast cancer among pill users. Rosenfield, "The Pill: An Evaluation of Recent Studies", *The Johns Hopkins Medical Journal*, 150: 178 (1982). Indeed, there is some evidence that oral contraceptives may be protective or inhibit development of ovarian and endometrial cancer. *See* Casagrande, J.T. et al., "Incessant Ovulation and Ovarian Cancer", *Lancet* 2: 170 (1979); McGowan, L. et al., "The Woman At Risk For Developing Ovarian Cancer", *Gynecol. Oncol.* 7: 325 (1979), and endometrial cancer. *See* Weiss, N.S. and Sayvetz, T.A., "Incidence of Endometrial Cancer in Relation to the Use of Oral Contraceptives", *New England Journal of Medicine*, 302: 551 (1980). The curriculum lists break-through intermenstrual bleeding, weight gain, nausea and vomiting, decreased mentrual flow, facial skin pigmentation, depression and vitamin deficiency as "common side effects" of the pill and mini pill, omitting the infrequent occurrence of these side effects (5077). (Laz Affidavit ¶ 11 (p. 12).) Nowhere does it mention that for sexually active minors the pill is much less risky than an unwanted pregnancy in terms of deleterious effects to a woman's life or health.

D. In discussing spermicides, which can be used alone or in combination with a diaphragm, the curriculum (see 5079) states that there *is* an association with the use of spermicides to congenital abnormalities in a future fetus. This is untrue. Spermicides actually have very, very few side effects, Martin Vessey, et al., "A Long-Term Follow-up Study of Women Using Different Methods of Contraception: An Interim Report", *Journal of Biosocial Science*, 8, No. 4 (October 1976), (none of my patients have ever had any) and are easily available for teenagers.

E. The curriculum also lists complications and side-effects of the diaphragm, including toxic shock, which has never been proven. There is no association between spermicides, which are used in conjunction with the diaphragm, and the future development of congenital abnormalities. The only known adverse health effects associated with barrier methods are rare instances of allergic reactions to the rubber or dusting powder used in diaphragms or the chemicals in spermicides. Martin Vessey, et al., "A Long-Term Follow-up Study of Women Using Different Methods of Contraception: An Interim Report", *Journal of Biosocial Science*, 8, No. 4 (October 1976). Nor does the curriculum mention evidence of the reduced risk of cervical cancer attributable to diaphragm use. Wright, et al., "Neoplasia and Dysplasia of the Cervix Uteri and Contraception: A Possible Protecting Effect of the Diaphragm," *British Journal of Cancer*, 38: 273-279 (1973). Other allergic reactions, pelvic pain, cramps or urinary tension rarely occur, and the curriculum does not mention this.

F. The curriculum is very misleading in that it does not discuss any of the benefits of contraceptives

except the benefits of natural family planning, for which no side effects are shown, even though natural family planning is a method that must be used in conjunction with a regular partner, and has never been used successfully with teenagers.

G. The curriculum goes through the complications of induced abortions. (pp. 2-3 ¶ 5083). In discussing the medical complications, it lists death, retained fetal parts, etc. The statistics given are that 10% of women who have abortions suffer some kind of complication, and 1% suffers serious complications. This is not true and conflicts directly with national statistics collected by the Center for Disease Control in Atlanta. First, it is grossly misleading to aggregate all complications of abortion. Complications of abortion are typically segregated into abortion-related morbidity and abortion-related mortality. According to the latest Center For Disease Control report, the overall death-to-case rates for legal abortion were 1.4 and 0.6 per 100,000 abortions for 1979 and 1980, respectively. U.S. Department of Health and Human Services, Center for Disease Control: Abortion Surveillance, 1979-80 (1983), at p.10. These figures reflect a significant decrease from the death-to-case rate of 3.2 during 1972-1975. Cates and Tietze, "Standardized Mortality Rates Associated with Legal Abortion: United States, 1972-1975", *Family Planning Perspectives*, 10: 110-111 (1978). Even though risk of morbidity varies with the type of abortion procedures, none of the procedures have a 10% risk of complications. For example, the risk of serious complications (including three or more days of fever over 38° C, hemorrhage requiring blood transfusion and unintended abdominal surgery) for all proce-

dures is lower than 3%; risk of serious complications associated with dilation and evacuation (D & E) procedures is 0.23, compared with 2.26 for saline instillation and 1.28 for prostaglandin instillation. U.S. Department of Health and Human Services, Center for Disease Control: Abortion Surveillance 1979-80 (1983), at p. 14.

H. An early, legal abortion is one of the safest medical procedures in the United States. From 1972-1978 the standardized abortion mortality rate was 1.8 per 100,000 abortions, substantially less than the standardized childbearing mortality rate of 12.5 per 100,000 live births. Thus, from 1972-78, women were 6.9 times more likely to die from legal abortion, with the gap increasing in more recent years. Lebolt, Grimes and Cates, "Mortality From Abortion and Childbirth: Are the Populations Comparable?" *JAMA*, pp. 188-189 (1982). Similarly, the standardized childbearing mortality rate (7.7) exceeded the abortion mortality rate (1.3). During this period teenagers were 5.9 times more likely to die from childbirth than abortion. Lebolt, Grimes and Cates, "Mortality From Abortion and Childbirth: Are the Populations Comparable?" *JAMA*, pp. 188-189 (1982).

I. In the discussion of delayed complications due to abortions, they state that especially in women who have more than one pregnancy, an abortion will result in a "failure to carry subsequent pregnancies to term, and infertility". This also is not true, and in fact studies done in the United States have concluded the opposite, that there is no association between legal abortion and miscarriage or premature births in subsequent pregnancies. Chung, Smith, Steinhoff, and Mi, "Effects of Induced Abortion on Subsequent Reproductive Function and Pregnancy Outcome", *American Journal of Public Health*, 72/6: 551 (1982).

J. The curriculum states that there will be psychological complications including anxiety, guilt, and depression from abortion. (p. 5084). This is not true, although some women may suffer psychological affects from abortion, studies have shown that it is more often and more serious that women suffer from anxiety and depressions postpartum. David, Rasmussen, and Holst, "Postpartum and Postabortion Psychotic Reactions," 13:88-93 (1981). In fact, many women feel relieved after an abortion and it alleviates anxiety.

K. Also in 5084, the curriculum states that there are no medical indications for performing an abortion. This is not true. Women who suffer from hypertension and diabetes mellitus have been identified as having high risk pregnancies. For example, women afflicted with "advanced" cardiac disease together with dyspnea, pulmonary congestion, cardiac enlargement or chronic arterial fibrillation are at high risk of acute heart failure or pulmonary edema during pregnancy. Early abortion is recommended for such women. Romney, et al., *Gynecology and Obstetrics*, The Health Care of Women, at pp. 711-712 (McGraw-Hill, 1981). Although modern medicine has made it possible for women, who are willing to undergo quite heroic measures, to carry pregnancies to term, it is not true that for every woman, particularly those with an unwanted pregnancy, that pregnancy and childbirth carry no risk of health or life complications. In fact, it is 4 to 16 times safer to have an early abortion than to continue a pregnancy and go through childbirth. In fact, for older women, an abortion is 15 times as safe as childbirth. Lebolt, Grimes and Cates, "Mortality From Abortion and Childbirth: Are the Populations Comparable?" *JAMA*, p. 190 (1982).

L. This curriculum also says there are absolutely no psychological indications for an abortion. (p. 5084) This also is not true. There are absolutely no studies that support that women with psychiatric problems "are more likely to suffer from an abortion than benefit from it". It is incomprehensible that this curriculum would teach teenagers that there are no psychiatric consequences from giving birth after rape. Yet it does. This is medically irresponsible and absolutely without any scientific basis. The curriculum continues to give the church's teaching on abortion, which is that no medical, economic or social reason can justify a deliberate and direct attack "on the life of an innocent human being". (p. 5084).

M. On 5085, the curriculum discusses veneral diseases. These are also called sexually transmitted diseases, or STD, and they are a great public health problem in the United States. On page 2, section 5086, the curriculum asks "how can STD be preyented?" and replies "[T]he medical profession advises to decrease promiscuity and avoid sexual contact. This seems to go along with our Christian teachings regarding sexual intercourse and marriage." This is not at all what the medical profession advises. The medical profession has made it very clear that people who are in danger of contracting or spreading STD should take adequate protection with their sexual contact and that condoms provide a good measure of protection. Barlow, "The Condom and Gonorrhea" *Lancet* 11:811, 1977; Berger, Keith and Moss, "Prevalence of Gonorrhea Among Women Using Various Methods of Contraception," *British Journal of Venereal Diseases*, 51:307, 1975. The condom probable protects a woman from contracting genital herpes from a man with

active penile lesions. AGI, *Making Choices*, p. 50 (1983). The curriculum says exactly the opposite. Page 5087, ¶ 3. "The use of condoms are often advocated in the media as a means of reducing the possiblity of infection. They are *not* effective in preventing sexually transmitted diseases." This is absolutely untrue; it is medically irresponsible to tell teenagers that condoms do not help prevent the spread of veneral diseases. The curriculum is curiously silent regarding evidence suggesting spermicides provide a measure of protection against veneral diseases. Jick, Hannan, Stergachis, Heldrich, Perera and Rothman, "Vaginal Spermicides and Gonorrhea", *JAMA*, 248: 1619 (1982). The misleading and deficient "factual presentation" is not only destructive to the teenagers but to the public health operations in the state of Massachusetts.

Executed on: _____

_____
Louis Laz, M.D.

ETHICAL AND RELIGIOUS DIRECTIVES
for Catholic Health Facilities

The Ethical and Religious Directives for Catholic Health Facilities, dated September 1971, were approved by the Committee on Doctrine of the National Conference of Catholic Bishops (letter from chairman, dated Oct. 30, 1971). In the judgement of the Committee on Doctrine these *Directives* contain nothing contrary to Catholic teaching or morality.

At the annual meeting of the National Conference of Catholic Bishops and the United States Catholic Conference, November, 1971, the *Directives* were approved as the national code, subject to the approval of the bishop for use in the diocese.

PREAMBLE

Catholic health facilities witness to the saving presence of Christ and His Church in a variety of ways: by testifying to transcendent spirtual beliefs concerning life, suffering, and death; by humble service to humanity and especially to the poor; by medical competence and leadership; and by fidelity to the Church's teachings while ministering to the good of the whole person.

The total good of the patient, which includes his higher spiritual as well as his bodily welfare, is the primary concern of those entrusted with the management of a Catholic health facility. So important is this, in fact, that if an institution could not fulfill its basic mission in this regard, it would have no justification for continuing its existence as a Catholic health facility. Trustees and administrators of Catholic health facilities should understand that this responsibility affects their relationship with every patient, regardless of religion, and is seriously binding in conscience.

A Catholic-sponsored health facility, its board of trustees, and administration face today a serious difficulty as, with community support, the Catholic health facility exists side by side with other medical facilities not committed to the same moral code, or stands alone as the one facility serving the community. However, the health facility identified as Catholic exists today and serves the community in a large part because of the past dedication and sacrifice of countless individuals whose lives have been inspired by the Gospel and the teachings of the Catholic Church.

And just as it bears responsibility to the past, so does the Catholic health facility carry special responsibility for the present and future. Any facility identified as Catholic assumes with this identification the responsibility to reflect in its policies and practices the moral teachings of the Church, under the guidance of the local bishop. Within the community the Catholic health facility is needed as a courageous witness to the highest ethical and moral principles in its pursuit of excellence.

The Catholic-sponsored health facility and its board of trustees, acting through its chief executive officer, further, carry an overriding responsibility in conscience to prohibit those procedures which are morally and spiritually harmful. The basic norms delineating this moral responsibility are listed in these *Ethical and Religious Directives for Catholic Health Facilities.* It should be understood that patients and those who accept board membership, staff appointment or privileges, or employment in a Catholic health facility will respect and agree to abide by its policies and these *Directives.* Any attempt to use a Catholic health facility for procedures contrary to these norms would indeed compromise the board and administration in its responsibility to seek and protect the total good of its patients, under the guidance of the Church.

These *Directives* prohibit those procedures which, according to present knowledge, are recognized as clearly wrong. The basic moral absolutes which underlie these *Directives* are not subject to change although particular applications might be modified as scientific investigation and theological development open up new problems or cast new light on old ones.

* * *

Section I

ETHICAL AND RELIGIOUS DIRECTIVES

* * *

11. From the moment of conception, life must be guarded with the greatest care. Any deliberate medical procedure, the *purpose* of which is to deprive a fetus or an embryo of its life, is immoral.
12. Abortion, that is, the directly intended termination of pregnancy before viability, is never permitted nor is the directly intended destruction of a viable fetus. Every procedure whose sole immediate effect is the termination of pregnancy before viability is an abortion, which, in its moral context, includes the interval between conception and implantation of the embryo. Catholic hospitals are not to provide abortion services based upon the principle of material cooperation.
13. Operations, treatments, and medications, which do not directly intend termination of pregnancy but which have as their purpose the cure of a proportionately serious pathological condition of the mother, are permitted when they cannot be safely postponed until the fetus is viable, even thugh they may or will result in the death of the fetus. If the fetus is not certainly dead, it should be baptized.

* * *

15. Cesarean section for the removal of a viable fetus is permitted, even with risk to the life of the mother, when necessary for successful delivery. It is likewise permitted, even with risk for the child, when necessary for the safety of the mother.

* * *

18. Sterilization, whether permanent or temporary, for men or for women, may not be used as a means of contraception.

19. Similarly excluded is every action which, either in anticipation of the conjugal act, or in its accomplishment, or in the development of its natural consequences, proposes, whether as an end or as a means, to render procreation impossible.

21. Because the ultimate personal expression of conjugal love in the marital act is viewed as the only fitting context for the human sharing of the devine act of creation, donor insemination and insemination that is totally artificial are morally objectionable. However, help may be given to a normally performed conjugal act to attain its purpose. The use of the sex faculty outside the legitimate use by married partners is never permitted even for medical or other laudable purpose, e.g., masturbation as a means of obtaining seminal specimens.

25. Radiation therapy of the mother's reproductive organs is permitted during pregnancy only when necessary to suppress a dangerous pathological condition.

* * *

TUFTS UNIVERSITY SCHOOL OF MEDICINE
AFFILIATED INTERNSHIP/RESIDENCY IN OBSTETRICS AND GYNECOLOGY
90 CUSHING AVENUE
DORCHESTER, MASSACHUSETTS 02125

HOUSE OFFICERS CONTRACT

Tufts University School of Medicine, St. Margaret's Hospital for Women, Carney Hospital, New England Medical Center Hospital and Cambridge City Hospital and LOUIS LAZ, M.D. hereby enter into a contract of internship/residency subject to the following terms:

* * * * *

The contracting intern/resident agrees:

1. LOUIS LAZ, M.D. hereby agrees: To serve faithfully during the entire period agreed upon as specified above.
2. To observe all policies, rules and regulations of the Hospitals and to consider that gross infraction thereof are justification for dismissal.

* * * * *

July 18, 1983

TO: ALL CONCERNED

FROM: Vincent P. Sullivan Jr., M.D.
Director, Ambulatory Services

RE: *Referral For Tubal Ligation, Artificial Family Planning Or Abortion*

It is the policy of St. Margaret's Hospital and of the St. Margaret's Hospital Out-Patient Department that referrals and/or appointments are not to be made to other centers for tubal ligations, artificial family planning or for abortions.

The St. Margaret's Hospital Out-Patient Department medical and nursing staff may simply advise a patient who wishes these services that they are available elsewhere. No formal referral, or note thereof, is to be made.

While working in the St. Margaret's Hospital Out-Patient Department, I expect all personnel will adhere to this Hospital policy.

I also recognize that this policy is difficult for many, but I will appreciate your cooperation.

GUIDELINES FOR AMNIOCENTESIS AT ST. MARGARET'S HOSPITAL

1. Amniocentesis is permissable at St. Margaret's Hospital for the detection of inherited genetic or chromosomal defects.

2. The amniotic fluid should be obtained at about 16 weeks gestation.

3. Ultrasonography should be obtained to confirm fetal age and placental location prior to amniocentesis.

4. Patients should read, complete and sign the Prenatal Diagnosis Screening Questionnaire and the Informed Consent and Release forms.

5. Amniocentesis at St. Margaret's Hospital will be performed in order to obtain a diagnosis that can be used to offer treatment to the developing fetus or to prepare the parents to handle a possibly defective or abnormal child, and only if the benefit of the information outweighs the risk of the procedure.

6. There will never be an intent against the life of the unborn child on the part of hospital administrators, medical personnel, or patients from the information gained by amniocentesis. Presupposed is that the patient's signature of consent constitutes a declaration of intent consistent with the PRO-LIFE philosophy of St. Margaret's Hospital.

7. Amniocentesis will not be used to merely learn the sex of the fetus.

8. There will be neither a recommendation of abortion nor referral for abortion should an abnormal result be obtained in keeping with present Roman Catholic moral practice.

9. The commitment of St. Margaret's Hospital by offering amniocentesis is purely PRO-LIFE. It assumes that sound counseling is occurring, directed by the woman's physician, and that expert counseling will be provided in the event of abnormal results.

I have read, understand, and accept the PRO-LIFE commitment of St. Margaret's Hospital and specifically as it pertains to amniocentesis.

_____ _____

DATE PATIENT'S SIGNATURE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

No. 83-3175

CHAN KENDRICK, ET AL., PLAINTIFFS,

v.

MARGARET HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, DEFENDANT.

Affirmation in Support of Plaintiffs' Motion for Summary Judgment

State of Massachusetts):
County of Middlesex):

I, Kim Maisenbacher, affirm the following is true under penalty of perjury:

1. I reside in Natick, Massachusetts. I am a registered nurse certified in midwifery and currently have a midwife practice at Newton-Wellsley hospital, Wellsley, Massachusetts.

2. I was employed as a midwife from December 1982 to July, 1983 in the St. Margaret's Teenage Pregnancy Program (TAPP) funded under the Adolescent Family Life Act grant to St. Margaret's. Based on my experience at St. Margaret's I believe it is a pervasively religious institution whose rendition of medical care, including that in the TAPP program, is dictated by, and designated to further, the tenets of the Catholic religion. In my position as a nurse funded under the Adolescent Family Life Act I was often forced to choose between the best interests of my patients and the current standards of medical care, and the hospital directives which were designed to further basic religious tenets. This irresolvable conflict was critical to my leaving the program. I believe that federal funds are being used to promote religious beliefs and practices that

are often at odds with the best medical interests of the teenage patients. For that reason I am making this affidavit in support of plaintiffs' motion for summary judgment.

3. St. Margaret's is a specialized hospital providing only gynocological and obstetrical care for women. This type of medical care is largely reproductive health care, which necessarily and ordinarily involves abortion, sterilization and contraception. Because of this, the vast majority of patients at St. Margaret's are affected by the religious restrictions placed on nurses, doctors and social workers. This affidavit will detail not only how St. Margaret's, as a Catholic institution furthers Roman Catholic beliefs but also how the TAPP program itself promotes such beliefs to the detriment of the teenage patients.

4. I began to work for the St. Margaret's Teenage Pregnancy program in December 1982. I was employed to provide prenatal care for the pregnant teenage patients, and continue with them through labor and delivery. In my employment interview I was told both by Nancy Barrows, director of Nurse-Midwives, and the personnel director, that I would not be able to discuss either abortion or artificial family planning with my patients because to do so would breach the religious tenets of St. Margaret's. I was given a booklet entitled "Ethical and Religious Directives for Catholic Health Facilities", (Exhibit A). It was made clear to me that if the religious rules in this booklet were not followed I could lose my job. Although I understand that the Adolescent Family Life Act permits teenagers to get information and referral for contraceptives with parental consent, and abortion referrals upon parental request, I was not informed of this when I worked at St. Margaret's and it is clear that even providing such limited information would breach the hospital rules as explained to me.

5. The religious directives made clear we could never allow procedures which are "morally and spiritually harmful" (Ex. A, p. 3) This included abortion from the moment of conception (Ex. A, p. 7), sterilization (p. 10), artificial contraception (p. 10).

6. In addition to the booklet on religious directives, I was given a copy of the St. Margaret's employee handbook which states that it follows the religious directives, that it is a "Christian institution", providing medical care "in harmony with the teaching of the Catholic Church", and that each person is "a child of God" from "the very moment of conception". (See p. 3-5 of Handbook, Exhibit B).

7. At the time that I took the TAPP job at St. Margaret's I believed I could follow St. Margaret's religious directives and still provide good medical care to my patients. I was wrong. At that time I did not know just how pervasively religious St. Margaret's is nor how my patients would suffer from the lack of complete medical options. I believed that my teenage patients could get abortion or contraception information from outside community resources. Subsequently, I found out this was practically impossible. Many of the teenage TAPP patients are poor, and nearly all are ignorant on how to make use of community resources. Most of them do not have any regular medical care and many have never even had a pelvic exam. Once at St. Margaret's they become completely dependent on it for their medical care and are both psychologically and physically incapable of navigating around Boston to find alternative care. Furthermore, most of them are not even aware they are being given limited care. The restrictions on St. Margaret's staff, including prohibitions on providing contraception or abortion information or referrals reinforce patients' lack of knowledge.

8. Although social workers were usually the first persons teenagers in the TAPP program talked to, when I was on call at the hospital I was occasionally the prime source of information for teenagers who asked where they could get abortion information. I felt in a moral bind since my training had taught me the obligation to give all necessary medical information and referrals, and my job restricted my abiiity to give such information. Usually I gave

truthful, full answers to the teenagers' questions although I felt very guilty and fearful about doing so.

9. Although discussion and provision of birth control is part of the medical standard of care at post-partum visits for all sexually active women, we could not comply with this standard for teenagers in the TAPP program. I believe this failure to help sexually active, unsophisticated minors greatly contributed to their return rate, i.e. teenagers who came back to St. Margaret's with a second unwanted pregnancy.

10. Another illustration of the skewed medical care funded under the AFLA was when one TAPP patient asked me if she could have sex during pregnancy. I answered "yes", which was a medical answer to a medical question. I was reprimanded for this answer by my supervisors because it was believed that to give that kind of information condoned teenage sex which was a position contrary to the hospital's religious beliefs.

11. The medical standard of care for patients is to give them all necessary medical options. This is not done for teenagers at St. Margaret's, where Catholic philosophy dictates medical care. This harms teenagers, some of whom would make the decision to have an abortion which might be the most medically safe decision. Some would decide to use contraceptives which would cut down the risk of venereal disease or another unwanted pregnancy. Even those teenagers who decide to put their babies up for adoption have limited options since they are all ordinarily referred to Catholic charities.

12. The labor and delivery rooms at St. Margaret's all contain religious crucifixes. The common rooms, the courtyard, and the outside of the building have religious symbols and statuaries. The prenatal clinic for teenage patients is on the first floor of St. Mary's home, a residence for single pregnant teenagers which is in a separate building, but part of St. Margaret's. St. Mary's is filled with crucifixes, other religious symbols and pictures.

These outward symbols constantly remind teenage patients of the religious nature of the institution.

13. A few of my TAPP patients were aware of the anti-abortion pressure exerted by the program because they spoke to me about the limited information given to them.

14. The desparate pregnant teenagers who go to St. Margaret's have a great need for medical care and counseling. They are very ignorant about their options and are never told when they answer St. Margaret's television or other media ads that they will be encouraged to become dependent on an institution which will deliberately perpetuate their ignorance by giving only medical procedures and information consistent with Catholic religious directives.

15. The ethical bind created because my AFLA patients were suffering from the imposition of religiously dictated health care was critical to my terminating my employment at St. Margaret's in July 1983. At that time, I explained this reason to Nancy Barrows, my superior.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on 9/13/84.

/s/ KIM MAISENBACHER
Kim Maisenbacher

Date: September 13, 1984

Norfolk, S.S.

Then personally appeared the above named, Kim Maisenbacher, and acknowledged the foregoing instrument to be her free act and deed before me.

My commission expires October 5, 1984

/s/ THOMAS E. LEE
Thomas E. Lee
Notary Public

St. Margaret's Hospital for Women

Employee Handbook

* * * * *

HISTORY OF ST. MARGARET'S HOSPITAL FOR WOMEN

High atop historic Jones Hill in Dorchester stands St. Margaret's Hospital for Women, one of the nation's leading specialty maternity centers and the largest Catholic obstetrical and gynecological hospital in the country.

* * * * *

An important component of this care is the spiritual dimension based upon the Judeo-Christian heritage. As a Catholic institution and part of the healing ministry of the Church, we continually strike to provide the kind of care that is scientific, loving, and compassionate. Within this framework religion, research and education are united to bring together care that will heal, alleviate and maintain the health of women and infants.

Philosophy

* * * * *

We hold that each person is made in the image of the Creator at the very moment of conception. Therefore, we attach to each person the dignity and destiny that comes with being a child of God.

As a Christian institution we are committed as well to the quality of life and hold firm to high standards of social justice, in harmony with the teaching of tne Catholic Church which guides us to the spiritual mission of each individual.

* * * * *

St. Margaret's Hospital for Women is a not-for-profit voluntary Catholic health facility established by the Archdiocese of Boston; administered by the Daughters of Charity of St. Vincent de Paul and commited to quality care which is consistent with the ethical and religious directives as promulgated by the Committee on Doctrine of the National Conference of Catholic Bishops.

St. Margaret's Hospital for Women accepts the basic principles of Judeo-Christian social living. It recognizes the dependence of man upon God, his Creator, and the consequent unity of all men because of their common origin and destiny in God. It acknowledges the dignity of every human being from conception to life eternal as being made to the image and likeness of God and endowed with intellect and free will. It respects individual differences in personality, beliefs and values as rights which are inherent in a Judeo-Christian democratic society.

* * * * *

Affirmation in Support of Plaintiffs' Motion for Summary Judgment

I, Reverend James Dittes, declare the following is true under penalty of perjury:

1. I am a professor of pastoral theology and psychology at Yale Divinity School, 409 Prospect Street, New Haven, Connecticut. My degrees include both a doctorate in psychology and a degree in divinity from Yale University. I have taught at the Yale Divinity School for 30 years. I directed the Ph.D. program in religion at Yale University from 1968-1975, and was chair of the department of religious studies from 1975 to 1982. I am an ordained minister in the United Church of Christ denomination. (See curriculum vitae attached as Exhibit 1.)

2. I served on the Board of Directors of Search Institute for 8 years ending in 1982. I am currently on the Advisory Board of Search.

3. I am making this affirmation in support of plaintiffs' motion for summary judgment because I believe that Search is a religious institution with religious purposes to further, and that, in particular, the AFLA grant awarded for the sex education curriculum was intended by Search to further the religious mission.

4. For the past ten years I have been a consultant for the New York State Board of Education to evaluate church-affiliated colleges to see whether they are sufficiently secular to qualify for state aid. This consultant work, along with my education, training, teaching, and experience as a Board member of Search all qualify me as an expert on the religiosity of Search Institute. My opinion is, however, limited to the present status of Search as directed by its founder and present president, Merton Strommen, who has plainly and strongly stamped the policies of Search with his own vocational and religious values. His successor, due to become president in 1985, will not necessarily continue these same religious policies.

5. Search was started as a conservative Lutheran research institution. Its founder and president, Merton Strommen, believes that the work of Search is to further a religious mission which promotes and encourages conservative Christianity, which is characterized by doctrinal orthodoxy, personal piety and adherence to a rigid and conventional moral code.

6. The president Strommen, Search's staff, and most of the Board are in agreement on the function and purpose of Search Institute. Although much of the Institute's work is objective empirical research in religion, undertaken mainly for conservative religious denominations, there is now an emphasis on the promotion of religious values, e.g., the curriculum funded by the AFLA. The inculcation of particular "values" is regarded as religiously mandated by Strommen and his staff. The values promoted by several Search programs are identified by Search and Strommen as religious values.

7. A preponderant number of the staff and Board believe in evangelical religious principles and in obedience to God. While it remains to be seen what the outcome of Search's work on the A.F.L.A. grant will be (until 1982, actual research by Search, although used by conservative churches, has been preponderantly objective.), it is quite evident that it was the intention of Strommen and Search, in connection with the A.F.L.A. grant, to promote selected conservative religious-based values among adolescent.

8. All board meetings open with a prayer or prayer breakfast with a specific Christian message. Board members are often invited to give "testimony" of their personal religious beliefs. There is a presumption of religious conformity among board members. (Such presumption of religious conformity is a characteristic of sectarian institutions). I believe that a Jew or liberal Christian would feel uncomfortable at the Board meetings.

Wherefore, affiant requests that this Court grant the relief requested.

September 17, 1984 /s/ JAMES DITTES
Executed on James Dittes

Study Guide for Film Used in Catholic Family Service, Amarillo

* * * * *

THEOLOGICAL ORIENTATION: Marriage is the sign that a relationship has matured and that the two people involved are ready to share their love with each other and with any possible children. When there is no mature relationship, marriage is not possible. But God is with the individuals who are making the difficult decisions of ending a relationship, of becoming a single parent, of permitting others to care for the child. The unwed mother is a person in need and calls us to be compassionate, as Christ was. She is also a sign of hope, witnessing to the fact that the life of her child is worth personal sacrifice.

RELATED ACTIVITIES:

1. Visit a local maternity home or pregnancy counseling center. Learn about the various services offered and the techniques used in interviewing prospective clients.

2. Broaden your perspective of the term "pro life". Explore other areas which are included in this term: e.g., quality of life for elderly, euthanasia, artificial life support, genetic manipulation, capital punishment, etc.

SUGGESTED SCRIPTURE READINGS:

Gen 1:26-31
1 Kings 3:16-28
Mt 7:1-6/Lk 6:37-38, 41-42
Mt 7:7-12/Lk 11:9-13

SUGGESTED OUTLINE FOR PARENT WORKSHOPS, CATHOLIC FAMILY SERVICE

SESSION I:

PARENT AND TEEN COMMUNICATION

Goal:

a. To present information on stages of development toward better understanding.

b. To enable parents to understand adolescence and to appreciate their sons and daughters

c. To practice techniques in communication with teens

A. *Self-appreciation/self-discovery/self-expression*

Self evaluation means evaluating self and the environment around us. This is done not only in terms of economic advancement but in terms of feelings of security, warmth, affection that the family gives us. Example: Children playing on the street, homes reflect a sense of belonging.

Interpretation of religion, sainthood cult, personalized relationship with God show extended kinship and value of close personal relationships.

AMARILLO GLOBE TIMES
Page 13
Wednesday, November 24, 1982

Family Service Gets Grant for $250,000

The Office of Adolescent Pregnancy in Washington, D.C. has given a $250,000 grant to Catholic Family Service of Amarillo.

The federal grant is designed for the development of education and counseling services and Catholic Family Service plans to use part of the grant to establish a home for unwed mothers.

* * * * *

Catholic Family Service plans the home for young unwed mothers to provide a place where they can live during their pregnancies and receive counseling to help them make the best decisions for them.

The agency, due to religious doctrine, recommends adoption for children born to young unwed mothers.

* * * * *

Excerpts from Grant Application of SEMO Association of Public Health Administration

* * * * *

We recognize that while the symptom of this problem is reflected in negative health statistics the problem itself is rooted deeply in the social and religious heritage of our nation. It is within the framework that a long term solution to the problem will have to be developed. School, business and government serve to shape the intellectual and economic framework of our lifestyles. The family and the church must be shapers of our moral and ethical framework for existence. The first and most basic assumption of this proposed demonstration project is nothing more sophisticated than this fact.

Effective programs for reducing teen sexual activity and adolescent pregnancy are most likely to succeed when built on a foundation of support by the family and the church.

* * * * *

One of the most obvious tools which can be used to change the attitude of young people toward sexual activity has been avoided for many years. That tool is the use of the religious foundation as a support for sexuality education. Most major religions see sexuality as being of God and can therefore effectively and in good conscience utilize appropriate educational materials to help young people to learn about their bodies and the values that relate to sexual functioning in a context that is consistent with the tenants of their particular faith. This type of educational format has not extensively been utilized in the mid-west or the south and has great potential for affecting a reduction in the amount of early and inappropriate sexual activity.

* * * * *

The applicant is applying under the *Special Considerations* section of the program announcement. *Demonstrating that church and community* based character development and sexuality education programs can have a significant effect on the incidence of early teen sexual activity and related teen pregnancy would be a validation of a concept that has been widely supported but seldom practiced. Parents believe that sex education should be done at home, but few parents feel comfortable in addressing this issue. The church believes that moral teachings will prevent immoral sexual activity but seldom uses its influence to assist youngsters in the development of a cohesive and defensible value system that can help them to cope more effectively with the sexual pressures of adolescence.

* * * * *

Objective 1: To demonstrate the effectiveness of a family/church based approach to positive self image and sexuality training for adolescents as a means of preventing early sexual activity and teenage pregnancy.

Action Step 1: To develop and implement (from existing resources) parenting programs and youth development services designed to build self esteem in at least five different church and family settings with at least 50 youth ages 12 to 13 participating in a five year follow-along study.

Action Step 2: To train instructors from area churches and assist them in establishing parenting and youth development programs with a goal of providing continuing services to at least 500 youth.

Action Step 3: To evaluate the various types of programs used in Action Steps 1 and 2 to determine at least the following:

acceptability of each program by community & participants)

effectiveness of each program in preventing teen sexual activity and pregnancy, in building self esteem, in educating and in values clarification.

programs most compatible in each setting (churches, civic organizations, etc.)

Objective 2: To demonstrate methods and techniques for increasing parental involvement and effectiveness in preventing adolescent sexual activity.

Action Step 1: To develop adolescent health advisory committees in each of the Bootheel counties.

Action Step 2: To sponsor and staff parent/child education seminars in area churches.

Excerpts from Description of SEMO Program

* * * * *

II. THE CHURCH CAN DO YOUR JOB BETTER, CHEAPER AND WITH MORE CONTINUITY

The church in the Bible Belt, and I'm speaking of religion in general, has long been the moral leader of our communities. They can effectively implement wholesome approaches to sexuality education with only limited assistance. In fact, many of the denominations have, at the national level, a very effective and appropriate curriculum outline for sexuality education. In our part of the nation, religious beliefs strongly support the concept that man is made in the image of God. This position supports the logic that the body is not something that our children should be ashamed of or feel embarrassed about. If sexuality is dirty, guilt-ridden or embarrassing, it is because society has made sexuality that way through attitudes. In presenting sexuality education in this light, we encourage church groups to take the leadership in assuring that their church members, as parents, insist upon being the first and primary sexuality educators in their children's lives. To let some other person, television, radio, literature or even the school, preempt this opportunity and responsibility, is a serious parental mistake. In Southeast Missouri, churches are buying this concept wholesale and are working closely with us to ensure that their parents are actively involved with their family in a sexuality education program. By and large, the churches that have been more supportive to date are fundamentalist church organizations that traditionally have been the most serious and vehement opponents of sexuality education in the schools. This, we think, is a significant change in direction.

In our program, we contact churches through individuals who already believe in this concept and let them do the selling with their minister and their church leadership. We contact conservative, fundamentalist churches

first. We believe that fundamentalist church organizations are most likely to be in opposition to our program; therefore, they could be the most difficult to sell. We think it is important that we do the hard work first and leave the easy work, the more progressive or traditional church organizations, to the last. *We avoid ministerial alliances and other ecumencial groups because, in our part of the nation, membership* in ecumenical groups is often limited to the more traditional or progressive church organizations. This means that anything the ministerial alliance is for, the more fundamentalist churches are likely to be against. *Therefore, we avoid seeking the support or guidance of ecumenical groups. We encourage churches to use sexuality education materials already available through their denomination.*

* * * * *

We recruit a couple in each church to be trained as lay educators. If each church can have a young couple expertly trained to lead workshops on sexuality education, we can be assured the influence of this research effort will continue for many years to come. We stress the church's responsibility in ending the double standard. Until men, fathers, and community leaders accept the responsibility for teaching their sons responsibility and respect for womanhood, we can not expect the double standard or inappropriate teen pregnancies to be discontinued. Most importantly with churches, we insist that our educators schedule follow-up contacts after the workshops. We expect that all participants in our workshops will have follow-up contacts to find out what they have been doing about the information they received during the workshop.

* * * * *

Statistical Summary of SEMO Presentations

INFORMATIONAL PRESENTATIONS

Year-to-Date
January 1,-September 30, 1983

Type of Group	# of Groups	# of People	% of Total
Religious Affiliation	27	646	43%
Civic Clubs	27	496	32%
Other (Government Agency employees, Teachers, Civil Servants)	31	389	25%
TOTALS	85	1,531	100%

TESTING RESULTS
(Research)

Total Incorrect – Pre	Total Incorrect – Post	% Improvement
1,540	313	80%

Belcher & Dixie Presbyterian Churches
P.O. Box 207
Belcher, Louisiana 71004
(318) 378-1214

January 11, 1983

Ms. Sandy Kahn
Northwest Regional Health Center
1525 Fairfield Avenue
Shreveport, Louisiana 71130

Dear Ms. Kahn,

Some time ago in a phone conversation with Ms. Karen Logan of Gilliam, Louisiana, you agreed to teach Sex Education to an interdenominational church related group known as the North Caddo Youth for Christ. This group is composed of young people, grades 7-12, who attend a number of schools in Caddo Parish. This letter is to formally request that you teach this and to confirm the date, time and topics you will be presenting.

According to my information, you have agreed to teach this course at the Belcher Presbyterian Church on Saturday, February 19, 1983, from 1 p.m. to 7 p.m. or so. For the first hour, you agreed to meet with the parents of the youth. The rest of the time you wished to meet with the youth to cover the following topics that we requested: physical changes; self-image; sexual intercourse and conception; dating and/or boy-girl relationships; values and decision-making. This will be followed by a brief presentation by myself on Biblical and theological views regarding sex.

I will call you later this week in order that we can set a time for you, Ms. Logan and me to meet and make further

plans. I encourage you to suggest any changes you feel are necessary. I look forward to meeting with you.

Sincerely,
/s/ BILL J. INGERSOLL
William J. Ingersoll
Pastor – Belcher & Dixie
Presbyterian Church

cc: Karen Logan

The Franciscans Sacred Heart Church
101 Cottonwood
Emporia, Kansas 66801
316-342-1061

April 25, 1982

Eileen Greischar, R.N.
Administrator
Lyon County Health Department

Dear Mrs. Greischar:

The Adolescent Family Life Program which you spoke to me about the other day is something that I as a pastor here in Emporia I am very much concerned about. I along with many of the other pastors here in Emporia have been looking for a program and a referral service which your program embodies. I sure hope that you are able to obtain funds for your program for it would be a great asset to our community.

I feel that many of the family living and human sexuality courses that are offered in the school systems do have gaps that your program will be able to cover. One to one counseling is so important. I feel that openness to life approach that you have is what I as a pastor would like to see more of. So often in cases of pregnancy people just want to "abort" without ever considering other approaches or having other alternatives explained to them.

Here at Sacred Heart Church we have been trying to give a more "wholistic" approach to the whole area of sexuality, pregnancy, birth control but we are more and more aware that we need a larger community based organization to complement our efforts. I sure hope that you are able to proceed with your plans and that you receive community as well as governmental support.

I have long admired the work that you and your staff do here in Emporia and I think that your Adolescent Family Life program is another example of your community concern and your forward thinking.

Sincerely yours,
/s/ REVEREND ROBERT WEAKLEY
Rev. Robert Weakley, O.F.M.
Pastor
Sacred Heart Church

Excerpt from Grant Application of Cities in Schools

C. Here's Life Washington

Cities-In-Schools is linked with Here's Life Washington, an interdenominational religious organization. Here's Life Washington serves the Adolescent Family Life Center as a spiritual resource for interested clients and their families as well as for residents of the Washington, D.C. community.

Religious organizations provide a belief system with standards and values by which a person can guide his actions. Research supports a belief system to be congruent with mental health. The belief system of Here's Life Washington supports the following purposes of the CIS/APP:

1. To promote self-discipline to the problem of premarital sexual relations.
2. To maximize guidance and support from families to adolescents.
3. To promote adoption as an alternative for adolescent parents.
4. To utilize community religious organizations as support systems to clients and their families.

Description of Here's Life Washington

The objectives of Here's Life Washington are:

1. To promote a lifestyle based on Biblical principles.
2. To provide a primary internal movitation to enable one to make constructive choices for one's life.
3. To encourage supportive relationships within the family system.
4. To provide a basis for increasing self-respect to help a person see their potential to become a productive member of society.

Here's Life Washington will implement the following method to accomplish their goals and objectives:

1. Individual counseling based on Scriptural principles.

* * * * *

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Appendix CS

DONALD H. FRANK
PASTOR

Boone Memorial Presbyterian Church
P.O. Box 427
Fourteenth and Dearborn Streets
Phone 209 459-0069
Caldwell, Idaho
83605

April 15, 1982

Terry Riley, Administrator
Community Health Clinics, Inc.
1503-3rd Street North
Nampa, Idaho 83651-4098

Dear Mr. Riley,

My first experience with the Adolescent Health Program and with the co-directors, David Reese and Ellen Peach, was last summer when the plans for the Cooperative Vacation Church School began. The committee decided to offer classes for adults while their children attended class. Myrtice Barrett, R.N. M.S. suggested we have the *Family Talks* program which she had heard about. We did offer the program and it was very well received by the parents. I also attended and was very much impressed by the material and the way it was presented by David and Ellen.

Since last summer's experience I have used the Adolescent Health Program's film resources. We showed films on puberty to students in our Youth Club Program and had discussions afterwards led by their teachers. We appreciate the services of the Adolescent Health Program, and the cooperation that David and Ellen have shown.

Our Church hopes to sponsor *Family Talks* again—possibly this next fall. We would be very willing to have people from this church trained as leaders. I would especially like to take advantage of being trained as a leader because of my work which deals with Christian Education for 2 years old through adult.

Sincerely,
/s/ MARY J. PASLEY
Mary J. Pasley
Director of Christian Education

MJP/bas

cc: Ellen Peach
David Reese

"WE SEEK TO KNOW CHRIST, TO SERVE HIM, AND TO MAKE HIM KNOWN"

Catholic Social Services
of Wayne County
Main Office: 9851 Hamilton Ave., Detroit, Michigan 48202 ■ (313) 883-2100
Branch Offices: 17108 Mack Ave., Grosse Pointe, Michigan 48224 ■ 881-6645
17332 Farmington Road, Livonia, Michigan 48152 ■ 421-3730
24331 Van Born Road, Taylor, Michigan 48180 ■ 292-5690
Timothy F. Ryan, A.C.S.W.—President
Bernard V. Kazyak, A.C.S.W.—Vice President

March 18, 1983

Dear Pastor,

I know you are busy. Still, I am sending one more thing for you to read. I would like to introduce an Adolescent Family Life Demonstration Project administered by Catholic Social Services of Wayne County and funded by the Federal Government. The project has been developed with the help of the Christian Service Department of the Archdiocese in response to an often articulated and deeply felt need within the community. We believe we have a curriculum which will strengthen family ties within a context of respect, values and responsibility.

Enclosed please find a brochure, fact sheet, and my card. The program is offered to any community group, parish, school, etc. which can enroll at least ten families. If you believe there is a group within your parish that would be interested, please call us.

Thank you,
/s/ GAIL E. ZETTEL
Gail E. Zettel, A.C.S.W.
Director, Adolescent Family Life Demonstration Project

GEZ: dg
Enclosures

A Parish Resource . . .
Catholic Social Services of Wayne County presents:
CASI*
COMMUNICATION AROUND SEXUAL ISSUES

- for TEENS (11-17)
- for their PARENTS

A recent statement by Pope John Paul II emphasizes the urgent need for family-based involvement in the healthy sexual development of family members. It follows, then, that parishes will need to find ways to provide assistance for parents and young people in order to achieve this goal.

In keeping with the Pope's strong guideline, Catholic Social Services of Wayne County developed and received funding for a special program which helps parents and young people learn communication skills and develop a valid base of information about sexual concerns.

The program is in its second year and has proven highly successful among such widely diverse groups as: Franklin Wright Settlement; Y.W.C.A.; Holy Trinity parish; Catholic and public school students; Barat Family Center; Family and Neighborhood Services and many others.

* * * * *

Theme and thrust of the C.A.S.I. sessions is to assist young people to make value-based judgments and commit themselves to assertive action which safeguards physical, psychological, and spiritual health.

* * * * *

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*C.A.S.I is a Federally funded Adolescent Family Life Demonstration Project.

Excerpts from Grant Application of Charles Henderson Child Health Center, Troy, Alabama

* * * * *

EDUCATIONAL SERVICES RELATING TO FAMILY LIFE

It has been said that "an intact family of origin and religious commitments seem to reduce the probability of sexual activity and pregnancy." It is our firm belief that a re-commitment to the family and its true meaning strengthens all the forces that combat sexual promiscuity, teenage pregnancy and result in adverse health and sociable impact. In our current service and education program and under its present operating functions, there is no practical way to reach the family. The school system is, of course, ideally suited for the identification of pregnant teenagers and for the education of those not pregnant. There appears to be only one mechanism through which the families may become a part of our effort, *that being the church*. Our program has had the complete support of over 40 pastors of churches in the Pike County community. Already, we look on the pastors as being a part of our planning effort and with this initial success we are proposing that a week in September 1982 be set aside as Family Week culminated by Family Sunday at which time the many pastors throughout the area will devote their message to some aspect relating to the Family, their commitment to each other, and their commitment to their moral standards. This has now been approved by the City Commission of Troy, Alabama, the Pike County Commission and the city of Brundidge, in the form of a proclamation. The Troy City Commission Proclamation is attached.

* * * * *

1) Continue to meet with the Officers of the Ministerial Task Force.

2) Develop a list of all religious organizations in the community.

3) Personally contact each Minister to explain, gather feedback, and solicite support for the "Family Week" Program.

4) Organize a specific task force composed of Ministers and TAP staff to design the specific Programs to be presented.

5) Present the programs during "Family Week".

6) Evaluate the impact of the program.

* * * * *

Excerpts from Grant Application of Hawaii Department of Health

Section 5: Involvement of Families, Religious Groups and Other Community Participants

Families, religious and charitable organizations, voluntary associations and other community groups will be specified as participants in each project component. It is the intent of the project to involve families, and the other appropriate community groups as a matter of philosophy in all project activities.

* * * * *

Outreach

Outreach efforts will be made to teens, families, schools, churches, etc. Well-trained outreach workers will be pivotal members of the project, support comfort, being the referral contact, a support figure, etc. Ideally two workers—one male, one female—and preferably, one older, one younger.

Religious Groups

Churches will be encouraged to offer their unique lesson materials on teen sexuality and family involvement. A growing resource file of all church produced materials already begun, will be expanded.

Excerpt from Play Presented by University of South Carolina

TRACIE: I went to the Doctor today. Found out I was pregnant. I haven't talked to anyone else about it yet.

* * * * *

CHARLIE: I think I'm going to have an abortion. That way I won't have to worry about any of this. But I wonder how my parents feel about this.

MAURICE: Your mother and I really are disappointed, we thought you had such a bright future. But as our daughter, we feel a strong need to support your decision with all the love we feel for you. But I really don't know if abortion is right or not. Do you?

CHARLIE: I'm not really sure either. Maybe the church can help me.

KARYN: The church never has, does not now, and will never approve of abortion, young lady.

CHARLIE: Well, I certainly know where the church stands. There's probably no one else to talk to about this.

* * * * *

KARYN: The church stands behind your decision. We will do everything we can to help support you and bring your child to God. But you must realize that in order for that child to grow to be the best person it can be, you'll have to spend a lot of time raising it properly.

* * * * *

FAMILY OF THE AMERICAS FOUNDATION, INC.
World Organization Ovulation Method-Billings. U.S.A.
The Christian Alternative
308 South Tyler Street, Covington, Louisiana 70433
(504) 892-4046

December 2, 1983

His Holiness
John Paul II
Vatican City
Europe

Most Holy Father:

We would like to report to Your Holiness the progress which we have made in obtaining U.S. government funding for our activities, both in the United States and for countries of the developing world.

We have recently received a grant for $350,000 from the Department of Health and Human Services, Office of Adolescent Pregnancy Programs to develop, test and disseminate a comprehensive national educational program for:

1) assisting parents to become more effective in providing sex education to their children, and;
2) teaching adolescents about their fertility, the importance of protecting their capability for procreation and encouraging them to accept responsibility for their sexual behaviour.

The purpose of this government program is to develop a secular sex education which will be acceptable to all religious denominations;

We have also received a grant from De Rance Foundation which will allow to us expand the government program to a more specific Catholic program for parents and adolescents, for which we have developed a preliminary outline.

This entire project will be carried out over a period of three years during which time we will prepare and test the program, evaluate and modify the curriculum and finally expand and disseminate the final work. We will also provide the program in videotaped format for use around the country, to parishes, schools and individual homes.

We are also moving toward finalization of an approved project with the United States Agency for International Development which will provide funds for three projects:

1) The printing and distribution of a simplified charting procedure to approximately 40 developing countries of Latin America, Africa and Asia which will improve and simplify the teaching of the Billings Ovulation Method of natural family planning.
2) The production and distribution of a film about the scientific background and practical application of the Billings Ovulation Method for the same 40 countries in five different languages.
3) Implementation of a comprehensive training program to train approximately 200 teachers of the Billings Ovulation Method for various countries of Latin America.

The workscope for two of these projects has been agreed upon by the Family of the Americas and the Agency for International Development, and the third one is under final revision. When the U.S. Congress reconvenes on January 23, 1984, they will consider approval of A.I.D.'s intention to enter into a Cooperative Agreement with Family of the Americas, encompassing these three projects. If Congress approves the agreement, we will receive approximately $1,000,000 to expand our efforts in the Third World.

We humbly request your prayers and blessing to accomplish successfully these ambitious projects.

Yours sincerely in the Lord,
/s/ MERCEDES WILSON
Mercedes Wilson
Director

MW/gb

Excerpt from Grant Application

FAMILY OF THE AMERICAS FOUNDATION

Fertility Appreciation for Families

I. *PURPOSE OF THE HEALTH AND HUMAN SERVICES GRANT*

Develop and impart a "working curriculum" to enable parents to instruct their 10-14 year old children about sex education

Help parents learn how to teach sex education to their children using this curriculum

Father's role in the educational process

Mother's role in the educational process

II. *THE FAMILY*

History of the family

Importance of the family

Forces working against the family

Effects of disruptive forces on children

Population control

III. *HUMAN SEXUALITY*

Definition of human sexuality

Physical sexuality

Intellectual sexuality

Philosophical sexuality

II. *PHYSICAL SEXUALITY*

Female anatomy and physiology

Male anatomy and physilogy

Prevention of the disruption of normal functions of the body

Evaluation of relationships based only on physical sexuality

V. *INTELLECTUAL SEXUALITY*

Develop of female characteristics

Development of male characteristics

Understanding fertility as a gift

Attitudes of females and males toward their sexuality

Rationale governing respect for natural laws

VI *PHILOSOPHICAL SEXUALITY*

Highest level of sexuality

Inclusion of values and teaching of values

Dignity of man and woman

Principles and ethics

VII. CHILD DEVELOPMENT FROM AGE 10 TO 14

Instilling ideas of personal worth, self-esteem, and dignity

Individual's responsibilities toward self, family, community, and country

Techniques and strategies for the communication of information

Billings Ovulation Method
"Adolescent Sexuality Program"

SPERMICIDES

DEFINITION:

Spermicides are available in numerous forms—including creams, jellies, suppositories, aerosol foam and foam tablets. They form a chemical barrier at the opening of the uterus that prevents sperm from reaching an egg in the uterus. They may also destroy or damage sperm.

POTENTIAL SIDE EFFECTS:

- Evidence of greater incidence of congenital disorders in children conceived during use of spermicides
  - Down's Syndrome
  - Limb reduction malformations
  - Malignant Neoplasms
  - Severe Hypospadias
- It increases the chances of vaginal infections by altering the normal chemical environment of the vagina due to the absorption of the spermicides.

DIAPHRAGM

DEFINITION:

A diaphragm is a flexible metal ring covered with rubber in the shape of a shallow dome. It is placed in the vagina so as to completely encircle the cervix, thereby preventing sperm from entering the uterus. It is usually used with a spermicide or sperm-killing jelly or cream applied to the side of the dome facing the cervix.

POTENTIAL SIDE EFFECTS:

- Evidence of Toxic Shock Syndrome has been linked to diaphragm use. Toxic Shock Syndrome, a rare, sometimes fatal illness, usually associated with tampon use—has been linked to the use of diaphragms in some women, as reported by the *New England Journal of Medicine*. Toxic shock first came to national attention more than a year ago when it was contracted by a number of menstruating women who consistently used vaginal tampons.

ABORTION

DEFINITION:

The premeditated killing of an unborn baby in the mother's womb during the period of gestation by artificially inducing the expulsion of the baby so that it does not survive.

IMMEDIATE COMPLICATIONS:

A) Early abortion: suction, D&C:

- laceration of cervix
- hemorrhage
- perforated uterus
- laceration of urinary bladder and ureters
- air embolism
- laceration of bowel
- shock
- anesthesia reactions: cardiac arrest, bronchial obstruction, anaphalactic shock
- transfusion reactions
- laparotomy
- hysterectomy
- retained tissue
- death

IMMEDIATE COMPLICATIONS – Continued:

B) Late abortion: Saline:

- transplacental hemmorhage
- anesthesia reactions
- hypernatremia
- edema of brain
- convulsions
- coma
- kidney failure
- heart failure
- failure to abort after death of baby
- baby born alive: badly burned

C) Late abortion: hysterotomy:

- all babies born alive
- hemorrhage
- transfusion reactions
- anesthesia complications
- hysterectomy
- high mortality rate

Delayed Complications:

- retained tissue
- continued bleeding
- septicemia
- pelvic inflammatory disease
- peritonitis
- re-admission for further surgery
- blood dyscrasias: afibrinogenanemia (failure of blood to clot)
- fetal homografts: (mass of fetal tissue in pelvis)
- lung abscess (aspiration of vomitus during anesthesia)
- deep vein thrombosis
- death

EFFECTS ON LATER PREGNANCY:

- sterility
- spontaneous miscarriage – 50 percent increase
- ectopic pregnancy – 200 percent increase
- mental retardation – 40 percent increase
- prolonged labor
- rupture of uterine scar (post hysterotomy)
- development of Rh antibodies in Rh negative mother
- cervical incompetence (after early abortions)

REFERENCES:

Ehrenreich, B., Dowie, M., and Minken, S., "The Charge: Genocide", Mother Jones, p. 35, November 1979. (This article is a part of a series of articles that won the 1979 National Magazine Award for excellence in American Journalism sponsored by the Columbia School of Journalism.)

Darling, J., et. al., *Lancet*, 1:170-72, 1975.

Harlap, S., et. al., *American Journal of Epidemiology, 102:217-21, 1975.*

Helms, J., Congressional Record, S18273, October 1, 1973.

Hodgson, J., et. al., *Journal of the American Medical Association*, 228:849-50, 1971.

Tietze, C., et. al., *Studies in family planning*, 3:97-122, 1972.

Viel, B., "The health consequences of illegal abortion in Latin America", *Pregnancy Termination*, MD: Harper & Row, pp. 353-60, 1979.

AFFIDAVIT

I, DOCTOR PAUL DEWAYNE SIMMONS, hereby affirm under penalty of perjury:

1. I am an ordained Baptist minister and professor of Christian Ethics at the School of Theology of the Southern Baptist Theological Seminary. I am making this affidavit as an expert on religious (theological) approaches to bioethical decision-making in support of plaintiffs' claim that the Adolescent Family Life Act, which permits religious organizations to be grantees but has an abortion restriction on eligibility discriminates against those religious groups and organizations whose theological approaches and moral perspectives on abortion make them ineligible for funding.

2. I received a B.A. from Union University, a B.D. and Th.M. from Southeastern Baptist Seminary and a Ph.D from Southern Baptist Seminary. I have done post-doctoral studies at Princeton Theological Seminary and at Cambridge University. (See resume attached as Exhibit A)

3. I am the author of numerous articles including "A Theological Response to Fundamentalism On The Abortion Issue", "Religious Liberty And The Politics of Abortion" and "Bioethical Issues In Christian Perspective." I am also the author of three books including, *Growing Up With Sex*, *Issues In Christian Ethics* and *Birth and Death: Bioethical Decisionmaking*. The latter is a systematic study of biblical perspectives on abortion, elective death, biotechnical parenting and genetics (a chapter of which is attached as Exhibit B). *Growing Up With Sex* is a book on sex education commissioned by The Southern Baptist Convention and published by that denomination's publishing company, Broadman Press, Nashville, Tennessee.

4. The definition of "person" is a theological or metaphysical question.

4a. The position that a fetus is a person from the moment of conception is a religious belief. This doctrine is the official teaching of the Roman Catholic Church and many fundamentalist theologians. Therefore, from this religious perspective, abortion is murder.

This was clearly and forcefully expressed by Pope Pius XII in 1951 in an *Address to the Italian Catholic Society of Midwives, Acta Apostolicae Sedis* 43:838-39:

> "The baby in the maternal breast has the right to life immediately from God. – Hence there is no man, no human authority, no science, no medical, eugenic, social, economic or moral 'indication' which can establish or grant a valid juridical ground for a direct deliberate disposition of an innocent human life, that is a disposition which looks to its destruction either as an end or as a means to another end perhaps in itself not illicit. – The baby, still not born, is a man in the same degree and for the same reason as the mother."

This statement was re-affirmed and enforced by subsequent Popes such as Pius XII in *Acta Apostolicae Sedis*, 43 (1951) and Paul VI, in *Humanae Vitae*, Acta Apostolicae Sedis 60:481-503 (1968).

Among fundamentalist theologians, such views are to be found in Francis Schaeffer and C. Everett Koop, *Whatever Happened to the Human Race* (Revell, 1979), p. 23ff. and Donald Shoemaker, *Abortion, The Bible and the Christian*, (Hayes, 1976), pp. 35ff. Scripture passages used in support of this position include the following:

Isaiah 49:1: "The Lord called Me from the womb; from the body of My mother He named Me."

Jeremiah 1:5: "Before I formed you in the womb I knew you, And before you were born I consecrated you; I have appointed you a prophet to the nations."

Psalm 139:13-16: "For thou didst form my inward parts; Thou to Thee, for I am fearfully and wonderfully made; Wonderful are Thy works and My soul know it very well . . . "

Psalm 51:5 "Behold, I was brought forth in iniquity, and in sin my mother conceived me."

Matthew 1:18, 20 "Now the birth of Jesus Christ was as follows. When His mother Mary had been betrothed to Joseph, before they came together she was found to be with child by the Holy Spirit . . . 'for that which has been conceived in her is of the Holy Spirit."

See Donald Shoemaker, *Abortion, The Bible and the Christian* (Hayes, 1976), p. 30 f. where he argues that God allows or permits such burdens (as pregnancy by rape or incest) to be placed upon women, but does not allow the termination of such pregnancies because the unborn is to be regarded as a person from the moment of conception (p. 36, 38, and 41.)

4b. Judaism and most mainline Protestant groups reject this concept of personhood on biblical, theological and logical grounds. Logically, for instance, it can no more be contended that a fertilized ovum (the moment of conception or a zygote) can be regarded as a person than a fertilized hen egg can be regarded as a chicken. Potentialities are not actualities, no matter how important beginnings are to the finished product. A DNA code is contained in every human body cell and thus could be fashioned into a person by the process of cloning. Thus, every body cell is potentially a person, but it is logically absurd to conclude that each cell of the body (including even cancerous cells) is a person.

The Bible makes a clear distinction betwen the value of a fetus and that of the woman. The story of Exodus 21:22-25 regards a fetus killed accidentally of monetary worth and thus a fine is levied against the man who caused the spontaneous abortion; but if the woman is injured, the law of retaliation in kind is applied. The woman is regarded as a person, the fetus is not. Furthermore, the creation narrative of Genesis 2:7 declares that "The Lord God formed man of the dust of the ground, and breathed into his nostils the breath of life; and man became a living

soul." Thus, Jewish and mainline Protestant thought has focused on breath or birth as the appropriate stage to speak of the personhood of the fetus.

Theologically considered, the biblical portrait of a person emphasizes certain traits or characteristics that are associated with "the image of God." These features include (1) life as animation—a person is a living breathing entity (Gen. 2:7); (2) a person is a moral decision-maker: "the man is become as one of us, to know good and evil" (Gen. 3:22); (3) the person is capable of reason and self-awareness; (4) the person is able to enter into relationship with others; and (5) the person has spiritual capacities, able to live in relation with God and be obedient in faith. This portrait is that of a complex, many-sided creature with the godlike ability and responsibility of making choices based upon values and moral and religious commitments. (See, for instance, Karl Barth, *Church Dogmatics*, III/4. pp. 327-333, for an outline of characteristics belonging to personhood theologically considered.)

5. There is consensus amoing fundamentalist leaders that abortion violates an absolute moral rule based on the assumption that the fetus is a human being from the moment of conception.

6. Fundamentalist theology has its origins in the early twentieth century as a response to the increasing influence of science upon religious understandings and an effort to strengthen orthodox beliefs for Protestants based upon a rationalistic and doctrinaire approach to theology. Its doctrinal bases are stated in *The Fundamentals*, which was published between 1910 and 1915. These include: the inerrancy and infallibility of the Bible; the virgin birth of Jesus, the bodily resurrection, the penal substitutionary theory of atonement, and the bodily return of Jesus at the last time, the end of the world. Its anti-scientific bias was seen most prominently in the Scopes "Monkey Trial" at

Dayton, Tennessee in 1925, when the theory of evolution was attacked as being contrary to Scripture and Christian understandings of creation. Perhaps the most notable emphasis of fundamentalist theology is its stress on God's activity through miracle.

Fundamentalism is not confined to a particular denomination (though there is the Independent Fundamentalist Convention with headquarters in Springfield, Missouri) but has representative proponents in most of the Protestant denominations. It can be identified both by its adherence to the fundamentals of theology (above) and by its spirit or attitude toward those who do not accept its propositional understanding of faith and religion. It is highly committed to converting the world to its point of view and resorts to persuasion and other types of coercion both legal and regulative as through the requirements of its boards and agencies that all Christians adhere to its tenets. It is highly dogmatic and authoritarian using its theological and moral tenets as tests for fellowship within local churches and within denominations. A basic tenet of fundamentalist theology relating to abortion is the doctrine of providence, that is, God's relationship to the entire process of conception and birth. For the fundamentalist, God is the cause and power of all that is and God governs all natural processes. Therefore, not only is the conceptus regarded as of equal value and personhood with the woman, but conception is viewed as the consequence of an act of God. Such an approach to moral issues through the "laws of nature" is regarded as untenable in mainline Protestant thought on scientific and theological-biblical grounds.

7. Fundamentalist teachings on the doctrine of providence as it relates to abortion preclude individual decision-making by the pregnant woman, however, Protestant teachings on abortion focus on the personhood of the woman and her rights and responsibilities in making the abortion decision. See James M. Gustafson, "A Protestant Ethical Approach." in *Abortion: the Moral Issues*, edited by Edward Batchelor, Jr. (Pilgram Press, 1982, pp. 191 ff, especially p. 197 where he argues that "the liberty of the woman's conscience" must be recognized. See also Paul D. Simmons, *Birth and Death* (Westminster, 1983), p. 90 f, where the importance of the Protestant notion of the priesthood of every believer is focused upon the woman as the primary moral decision-maker in the matter of pregnancy termination.

8. The abortion issue divides denominations along theological and ethical lines. The Southern Baptist Convention has been divided about evenly on abortion as public policy, i.e., toward the legal availability of abortion. In resolutions in 1971, 1974 and 1976 legalized abortion was supported; in 1980, 1983, and 1984 resolutions called for the prohibition of abortion. (See attachment, Exhibit C.)

9. The consensus among Biblical scholars is that the Bible makes a clear distinction between the woman as person and the fetus. The fetus has value (Exodus 21:22f.) but is not reckoned as a person under the law until birth (Genesis 2:7). The Bible contains no prohibition of elective abortion even though abortion was practiced in biblical times. This is especially noteworthy in light of the fact that so much of the New Testament was addressed to churches in the Greco-Roman world where abortion was commonly practised.

10. Differing theological teachings on religious liberty are determinative of a denomination's position on abortion legislation.

Fundamentalism is theocratic, with roots in New England Puritanism and thus seeks to legislate both doctrine and morals as does traditional Roman Catholic thought which advocates a "church-over-state" approach. Vatican II documents also advocated religious liberty and freedom of conscience.

> " . . . the human person has a right to religious freedom. This freedom means that all men are to be immune from coercion on the part of individuals or of social groups and of any human power, in such ways that in matters religious no one is to be forced to act in a manner contrary to his own beliefs."
>
> " . . . the right to this immunity continued to exist even in those who do not live up to their obligation of seeking the truth and adhering to it. Nor is the exercise of this right to be impeded, provided that the just requirements of public order are observed."

Dignatatis Humanae: Declaration on Religious Freedom, chapter 1.

This statement makes it clear that any law, such as those concerning the legal availability of abortion, is to be based on "the just requirements of public order" and not on religious doctrine.

This also explains why Catholics are deeply divided on the subject of abortion and public policy: those who strictly follow traditional teachings and the pronouncements of the Roman Catholic hierarchy are advocating the imposition of a religious dogma as law; those who follow Vatican II are advocating freedom of conscience and opposing the efforts to base law on the notion of a fetus as person from the moment of conception, as indicated in *Humanae Vitae*.

Free church Protestants deal with the question of abortion as a matter of private religious morality, refusing to support a legislative ban since a religious doctrine should not be imposed by law upon all religious groups in a pluralistic society.

The 1983 General Assembly of the Presbyterian Church adopted a statement clearly based upon this principle. In supporting the legal availability of abortion, it declared that:

(1) Public law should not be based upon or support particular religious views;

(2) Public law should establish *public* policy and protect the *public* interests;

(3) Law should not pre-empt or preclude *moral* decisions;

(4) Public law should not make decisions easy for some, difficult or impossible for others.

(5) Moral decision requires (a) time, (b) careful consideration and (c) a third party.

11. My book, *Growing Up With Sex*, is a book officially sanctioned by the Southern Baptist Convention for sex education classes for 11-14 years olds. It was written: (1) to encourage chastity before marriage, (2) to inform youngsters about sexual function, and (3) to discuss difficult areas in developing sexual attitudes and confronting problems in sexuality. Abortion is discussed as an example of the latter. Thus, no Southern Baptist Church that uses this officially commissioned work would be eligible under the "Adolescent Family Life Act" even though it advocates sexual abstinence for teenagers.

12. It is my understanding that the "preventive" aspect of the Adolescent Family Life Act funds religiously affiliated groups, among others, to teach values to teenagers, including the importance of premarital chastity. Furthermore, these preventive sex education programs can only include negative material about abortion or omit it entirely, thereby giving teenagers biased information about pregnancy options. As a religious expert, I find the concept of the government funding religiously-affiliated groups, or secular groups which involve religions, to teach sex education courses very troublesome. The very purpose of religion is to transmit certain values, and those values associated with sex, marriage, chastity and abortion involve religious values and theological or doctrinal issues. In encouraging premarital chastity, it would be extremely difficult for a religiously affiliated group not to impart its own religious values and doctrinal perspectives when teaching a subject that has always been central to its religious teachings.

13. It is my considered judgment that the "Adolescent Family Life Act" violates both the letter and intention of the First Amendment guarantee that "Congress shall make no law respecting an establishment of religion or restricting the free exercise thereof." In basing the "Adolescent Family Life Act" on one particular side of a profound theological debate among American religious groups, it has wittingly or unwittingly attempted to settle a theological dispute for all Americans. Therefore, Congress has entered the realm of theological debate which seems to violate the restriction that "Congress shall make no law respecting an establishment of religion . . . " At least one meaning of the Establishment Clause seems to limit the role of Congress so as to prevent its entering the arena of theological disputes. This Act clearly discriminates against those who do not subscribe to or believe particular religious or theological perspective.

I hereby swear that the foregoing is true under penalty of perjury.

Dated:
November 16, 1984 /s/ PAUL D. SIMMONS
Paul DeWayne Simmons

AFFIDAVIT

RABBI DAVID M. FELDMAN hereby affirms under penalty of perjury:

1. I am ordained as both an Orthodox and Conservative Rabbi and presently serve as Rabbi of the Teaneck Jewish Center in Teaneck, New Jersey. I am making this affidavit as an expert on Jewish law in support of plaintiffs' claim that the Adolescent Family Life Act, which discriminates against organizations based on their abortion positions, divides religious organizations along denominational lines and discriminates against Jewish organizations whose services would make them ineligible.

2. I attended Yeshiva University and the Jewish Theological Seminary and have been actively engaged in the study of Jewish law since my ordination in 1955.

3. I am a member of the Law Committee and Steering Committee of the Rabbinical Assembly, and am Chairman of the Medical Ethics Commission of the Jewish Federation of New York.

4. I was a member of the editorial advisory of a multivolume encyclopedia of bioethics issued by the Kennedy Institute of Bioethics in Washington and wrote for that encyclopedia on article on abortion and Jewish law.

5. I have published a book on birth control and Jewish law, entitled *Marital Relations, Birth Control and Abortion in Jewish Law* (1968). This book includes a point-by-point comparison with principles of the classic Christian tradition (Catholicism) relating to sexual relations, abortion, and birth control.

6. Jewish religious teachings on abortion are based on the Five Books of Moses, the Mishnah and the G'mara (which comprise the Talmud), and Responsa literature through the centuries.

7. Jewish teachings hold that a fetus is not a human person until it exits the womb into the light of the world. This principle is a metaphysical-cultural determination and

cannot be affected by scientific or technological developments. It also differs from other metaphysical systems which regard abortion as worse than murder because the fetus remains uncleansed of original sin.

8. Under Jewish law, abortion is not the murder of an innocent person; only killing of the potentially human. Also, it cannot be murder, for even a pregnant women must choose martyrdom over murder of the innocent.

9. The Mishnah teaches that for a woman whose life is threatened even up to the moment of birth, abortion is required. This is because her actual life must be given precedence over any potential human life.

10. It is a Rabbi's obligation to counsel a woman that it is her religious duty to follow the advice of her doctor when the doctor sees a threat to her life or health.

11. Mainstream Jewish teaching and doctrine hold that abortion is also warranted where a woman's mental health is at real risk.

12. In Jewish law a mother's life takes precedence over that of the fetus, and a woman's pain and welfare are also to be considered ahead of becoming or remaining pregnant.

13. Jewish law mandates respect for a woman's decision regarding termination of a pregnancy, providing it is based on these moral priorities.

I affirm that the foregoing is true under penalty of perjury.

Dated: RABBI DAVID M. FELDMAN

Rabbi David M. Feldman

AFFIDAVIT

BEVERLY W. HARRISON hereby affirms under penalty of perjury:

1. I am a professor of Christian Ethics at Union Theological Seminary in New York and past president of the Society of Christian Ethics. I am an expert on the various Christian theological traditions on abortion, and have published a book critiquing them, entitled *Our Right to Choose* (1983). (Curriculum vitae attached as Exhibit A).

2. I am making this affidavit in support of plaintiffs' claim that the Adolescent Family Life Act, which permits religious or religiously affiliated organizations to be grantees but has an abortion restriction on eligibility, discriminates against religious organizations along denominational lines since some religious bodies have theological teachings on abortion which make them ineligible for funding.

3. The question of the permissibility of abortion is related to specific theological teaching and the answer varies among different denominations and religious groups. The differences are based on several aspects of doctrine such as what a denomination teaches about the nature of sin, the role sexuality, the nature of a fetus, and also on whether emphasis is placed on the importance of individual's conscientious decisionmaking, and the value of a woman's life and her physical and mental well-being.

4. Theological teaching about fetal life varies. Jewish religious tradition tends to place a pregnant woman's well-being above the value of the fetus. Many Protestants teach that fetal development must be well advanced before "personhood" can be ascribed to the fetus. Since the late nineteenth century the Roman Catholic Popes have insisted that Roman Catholics must believe that full human life begins at conception.

5. The Roman Catholic hierarchy now insists that a conceptus is a fully human being from the moment of conception and aims to impose this belief on all Catholics.

6. Theological ideas about the given value of the fetus within a particular religious group condition its teaching as to whether abortion is a permissible alternative within the denomination or religion. Well over a dozen Christian denominations have public policies on abortion that make it possible for their clergy and laity to support the option of abortion in some or many instances. The Adolescent Family Life Act is discriminatory to these Christian groups as well as to Jewish and Hindu people or to those who profer no religious belief.

I swear that the foregoing is true under penalty of perjury.

Dated: November 1, 1984 /s/ BEVERLY W. HARRISON
Beverly W. Harrison

AFFIDAVIT

Frederica Foster Hodges, affirms the following is true under penalty of perjury:

1. I am the executive director of The Religious Coalition For Abortion Rights (RCAR) located at 100 Maryland Ave., N.E., Washington, D.C. I have been Director for over 1-1/2 years, prior to that I was associate director for 5 years.

2. I am making this affidavit in support of plaintiffs' motion for a summary judgment.

3. RCAR is a national membership organization located in Washington D.C., with active affiliates in 21 states. The purpose of RCAR is to educate the American public about the diversity of religious views in the religious community on abortion, and to educate the public about the threats to religious liberty, posed by anti-abortion legislation.

4. The membership of RCAR is comprised of thirty one divergent religious organizations. Because each religious denomination approaches the issue of abortion from the unique perspective of its own theology, members hold widely varying views on when abortion is morally justified. All agree however, that there are situations in which abortion may be a moral alternative and all agree that every woman must have the freedom to make decisions concerning abortion in accordance with responsible medical practice and in light of her conscience and religious beliefs.

5. It is my job to research, authenticate, verify and present the religious views of our members to the public. To disseminate these views we have published a booklet entitled "We Affirm" setting forth the varying religious views of our members. A copy is annexed hereto as Exhibit A.

6. Our members are unified by the view that laws restricting abortion or discriminating between sectarian groups based on their religious beliefs about abortion, such as the AFLA, are a threat to their religious liberty.

7. As a part of my ongoing duties I also compile and disseminate the religious positions on abortion of denominations which do not belong to RCAR.

8. Any statute which funds religious groups to teach sex education or provide care for pregnant adolescents and restricts funding to groups which do not or would not discuss abortion as a moral or religious option would violate the religious precepts of the members of RCAR making them ineligible for applying for such grants.

/s/ FREDERICA HODGES

Frederica Hodges

Dated: 10-18-84

AFFIDAVIT

I, REVEREND JOHN PHILIP WOGAMAN, hereby state under penalty of perjury:

1. I am a Professor of Christian Social Ethics at Wesley Theological Seminary in Washington, D.C. I am making this affidavit as an expert on religion in support of plaintiffs' claim that the Adolescent Family Life Act, which permits religious organizations to be grantees of federal funds but has an abortion restriction on eligibility, discriminates against religious organizations along denominational lines since some religious bodies have theological teachings on abortion which make them ineligible for funding.

2. I received a B.A. degree from University of the Pacific; a Bachelor of Sacred Theology from Boston University School of Theology, and a Ph.D. in Social Ethics from Boston University. I am an ordained United Methodist Minister. (See resume attached as Exhibit A).

3. I serve on the Committee on Religious Liberties of the National Council of Churches. I am a member and a past president of the Society of Christian Ethics, the major academic society for Protestant and Catholic teachers and scholars of Christian Ethics in the United States and Canada.

4. I am the author of six books. I have co-authored with Paul McCleary a book entitled *Quality of Life in a Global Society*. I have written a pamphlet entitled *Abortion: Shall We Return to Absolutism: The Supreme Court Decision in Moral Perspective*, and an article for the *Washington Post* entitled "Abortion as a Theological Issue".

5. For religious denominations, the issue of abortion is based on each group's theological teachings. The abortion issue deeply divides denominations along religious lines. The theological differences are based in part on the value given to a fetus, the value given to a woman's life and well being as well as the importance of individual, conscientious decision-making.

6. The question of when a fetus normatively becomes a human life is essentially a religious question, and the answer differs from one religion to another. Some religions, such as Roman Catholic, believe that human life begins at the moment of conception and a fertilized ovum is a life equal in value to persons who have been born. Abortion, therefore, under these religious teachings is murder or the equivalent.

7. My own belief is that the point a fetus becomes truly human, in the normative sense, is when its brain is sufficiently developed to make consciousness possible. That appears to be sometime before birth but well after conception. There is a consensus among many Protestants that this true humanity does not exist at the earliest stages of pregnancy, even though fetal life is important for its potentialities.

8. It is also a teaching of many Protestant groups that the woman's health takes precedence over that of the fetus until the birth of the child. In fact, some Protestant teachings hold that it may be the religious duty of a woman to have an abortion depending on particular circumstances.

9. Most Protestants teachings, such as Methodist, hold that the decision to have an abortion should be conferred to the woman and her own religious conscience. The church does not wish to interpose its institutional judgment on her ultimate decision.

10. It is also Methodist teaching that a pregnant woman should be counseled on all options available to her. A statute precluding such counseling on all options, including abortion, could therefore disqualify Methodist and other religious groups unless they compromised their religious teachings.

11. It is my understanding that the "preventative" aspect of the Adolescent Family Life Act funds religiously affiliated groups, among others, to teach values to teenagers, including the importance of premarital chasity. Furthermore, these preventative sex education programs can

only include negative material about abortion or omit it entirely, thereby giving teenagers biased information about pregnancy options. As a religious expert, I find the concept of the government funding religious-affiliated groups, or secular groups which involve religions, to teach sex education courses very troublesome. The very purpose of religion is to transmit certain values, and those values associated with sex, marriage, chastity, abortion have for religions, been religious values. Although, for example premarital chasity may be encouraged for valid secular reasons, it would be extremely difficult for a religiously affiliated group not to impart its own religious values when teaching a subject that has always been central to its religious teachings.

I swear that the foregoing is true under penalty of perjury.

Dated:

REVEREND JOHN PHILIP WOGAMAN

SUMMARY OF CONTENT

I. *STATEMENT OF PURPOSE AND PHILOSOPHY*

Purpose: to aid parishes in providing formal programs of sexuality education by

1. supporting the efforts of those who already have begun to address the issue of sexuality in their programming.

2. encouraging those who have not yet addressed the issue of sexuality in their formal programming to do so.

Philosophy: The Family Life Apostolate, the Office of Religious Education and the Catholic School Office believe that parishes should provide formal programs in sexuality education. This education should:

1. respect parental rights and responsibilities
2. be based on Catholic teaching
3. be positive and prudent

II. *CHURCH TEACHINGS MANDATING SEXUALITY EDUCATION*

Not only do the Family Life Apostolate, the Office of Religious Education and the Catholic School Office encourage parishes in the many facets of parish life to provide sexuality education, but also the National Catechetical Director, the United States Catholic Bishops, and the Second Vatican Council among others see this need and address it.

III. *PRINCIPLES AND GOALS OF SEXUALITY EDUCATION*

The FLA, ORE, CSO base their recommendations regarding sexuality education on the understanding that persons are unique, good, loved and loving, sexual, responsible, committed, faithful and procreative.

IV. *RECOMMENDATIONS*

Specific recommendations are made on the following premises:

- Parents have the primary responsibility for the religious education of their sons and daughters.
- Sexuality education should be based on Catholic teaching.
- Education in sexuality should be both positive and prudent.

Suggestions are made here for: - planning
- curriculum
- staffing

I. *STATEMENT OF PURPOSE AND PHILOSOPHY*

At the very center of our lives rests the truth that God has first loved us. As human persons we are called to respond to God's love. In fact, our very humanness is God's gift to us and as we grow toward fully developing that humanity, we become more whole – more holy. Christian education toward human wholeness includes education in human sexuality, an integral part of who we are as human persons.

With this in mind, the FLA, the ORE and the CSO encourage parishes in the many facets of parish life to provide formal programs in sexuality educa-

tion which will help all parishioners—young and old, children and adults—grow into the understanding and appreciation of their own sexuality. These formal programs will not replace the informal education in sexuality which happens regularly in family life. They should rather supplement the primary role of parents, encouraging communication between parents and children, and among all parishioners. Moreover, since other sexuality education programs may already exist in the community—particularly in the public schools—parishes need to be aware of these programs: supporting what is good in them, working in dialogue with public school administrators, while at the same time insisting that these programs reflect basic Judeo-Christian values. Formal parish programs in sexuality education are needed to teach specifically Christian and Catholic values to the Catholic members of the community.

This education should:

A. respect parental rights and responsibilities

B. be based on Catholic teaching

C. be positive and prudent

The guidelines which follow are meant to aid parishes in planning sexuality education programs. We encourage everyone to read them in conjunction with the guidelines for discussion and planning developed by the National Committee for Human Sexuality Education, Department of Education, United States Catholic Conference: *Education in Human Sexuality for Christians.*

AFFIDAVIT AUTHENTICATING DRAFTS OF THE ADOLESCENT FAMILY LIFE ACT

I, Asta Kenney, affirm under penalty of perjury that:

1. I am Associate for Policy Development at the Alan Guttmacher Institute in Washington, D.C. It is part of my job to review drafts of proposed legislation which affects reproductive rights.

2. In the course of my job I obtained copies of the attached drafts of the Adolescent Family Life Act, 42 U.S.D. § 300z-300z-10, which was passed by Congress in 1981.

3. The documents attached hereto are true and correct copies of the drafts obtained by me from staff of the members of the Senate Committee on Labor and Human Resources.

I affirm that the foregoing is true under penalty of perjury.

Date: /s/ ASTA KENNEY
Asta Kenney

COMMITTEE PRINT
May 21, 1981

97th CONGRESS
1st Session

S. 1090

To amend the Public Health Service Act to support services and research relating to adolescent pregnancy and parenthood.

IN THE SENATE OF THE UNITED STATES

April 30 (Legislative day April 27), 1981

Mr. Denton (for himself and Mr. Hatch) introduced the following bill; which was read twice and referred to the Committee on Labor and Human Resources

[Strike out all after the enacting clause and insert the part printed in italic]

* * * * *

RESTRICTIONS

"Sec. 1911 (a) No funds provided under this title may be used to provide abortion counseling or referral, to make any payment for the performance of an abortion, or to conduct any research relating to abortion, except that a recipient of a grant or contract under section 1908 may conduct research relating to the consequences of abortion.

"(b) No project or program which receives any funds under this title—

"(1) may provide abortion counseling or referral;

"(2) subcontract with any person who provides such counseling or referral;

"(3) make any payment for the performance of an abortion;

"(4) subcontract with any person who makes such payments or performs abortions; or

"(5) conduct or subcontract with any person who conducts research relating to abortion, except that a recipient of a grant or contract under section 1908 may conduct research relating to the consequences of abortion.".

(b) Effective October 1, 1991, title VI of the Health Services and Centers Amendments of 1978 are repealed.

AS REPORTED OUT OF COMMITTEE

COMMITTEE PRINT

June 24, 1981

97th CONGRESS
1st Session S. 1090

To amend the Public Health Service Act to support services and research relating to adolescent pregnancy and parenthood.

IN THE SENATE OF THE UNITED STATES

April 30, (legislative day April 27), 1981

Mr. Denton (for himself and Mr. Hatch) introduced the following bill; which was read twice and referred to the Committee on Labor and Human Resources

[Strike out all after the enacting clause and insert the part printed in italic]

---

* * * * *

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"(4) subconstract with any person who makes such payments or performs abortions; or

"(5) conduct or subcontract with any person who conducts research relating to abortion, except that a recipient of a grant or contract under section 1908 may conduct research relating to the consequences of abortion."

* * * * *

General Information

The Mission of Brigham Young University

The mission of Brigham Young University—founded, supported, and guided by The Church of Jesus Christ of Latter-day Saints—is to assist individuals in their quest for perfection and eternal life. That assistance should provide a period of intensive learning in a stimulating setting where a commitment to excellence is expected and the full realization of human potential is pursued.

* * * * *

To succeed in this mission the university must provide an environment enlightened by living prophets and sustained by those moral virtues which characterize the life and teachings of the Son of God. In that environment these four major educational goals should prevail:

- All students at BYU should be taught the truths of the gospel of Jesus Christ. Any education is inadequate which does not emphasize that His is the only name given under heaven whereby mankind can be saved. Certainly all relationships within the BYU community should reflect devout love of God and a loving, genuine concern for the welfare of our neighbor.

* * * * *

In meeting these objectives BYU's faculty, staff, students, and administrators should also be anxious to make their service and scholarship available to The Church of Jesus Christ of Latter-day Saints in furthering its work worldwide in an era of limited enrollments. BYU can continue to expand its influence both by encouraging programs that are central to the Church's purpose and by making its resources available to the Church when called upon to do so.

* * * * *

Religious Education

Courses in Religious Education assist each student to develop a mastery of the scriptures and their essential teachings, and appreciation for the truths of the gospel of Jesus Christ. The ongoing study promotes integration of religious understanding with all other learning at the university. Special sections of RelC. 231 are provided for non-LDS students, dealing with the religious message inherent to Brigham Young University's mission in a way that is sensitive to their particular needs.

* * * * *

The BYU Code of Honor

The Church of Jesus Christ of Latter-day Saints sponsors Brigham Young University to provide a university education in an atmosphere consistent with the ideals and principles of the Church. The maintenance of high standards of personal behavior and appearance is essential to the preservation of that atmosphere and to the development of men and women who personify these ideals and principles. By enrolling or accepting employment at Brigham Young University a student signifies willingness to live in accordance with the following principles, whether on or off campus:

1. Abide by the standards of Christian living taught by The Church of Jesus Christ of Latter-day Saints.

   This includes graciousness and consideration for others and the observance of high principles of honor, integrity, and morality.

* * * * *

UNIVERSITY POLICIES AND PROCEDURES

* * * * *

Criteria for Admissions

The University Admissions Committee gives primary consideration to two characteristics of applicants to Brigham Young University, expressed in the following questions: (1) is the applicant willing to participate in and contribute to an environment where the principles of the gospel of Jesus Christ are believed and practiced? (2) Has the applicant made serious preparation for university work?

* * * * *

Tuition and General Fees
(Effective Fall Semester 1984)*

Per Semester (Fall or Winter)

Latter-day Saints	Others
Undergraduates	Students
Full-time	
$ 700	$1,500

* * * * *

*Approximately 70 percent of the cost of operating the university is paid from the tithes of The Church of Jesus Christ of Latter-day Saints. Therefore, students and families of students who are tithe-paying members of the Church have already made a significant contribution to the operation of the university. Because those of other faiths will not have made this contribution, they are charged a higher tuition, a practice similar in principle to that of state universities charging higher tuition to nonresidents.

Plaintiffs' Statistical and Narrative Summaries of Defendants' Responses

INTRODUCTION

Of the 1251 facts submitted by the plaintiffs, 1215, or 97.8% of these are either admitted or must be deemed admitted because Defendant's response is inadequate as a matter of law under Rule 56(e).[1] This appendix contains detailed statistical and narrative summaries of defendant's responses to plaintiffs' material facts. The 29 facts, which in their entirety or in part are in genuine dispute, are cumulative and therefore irrelevant to plaitiffs' legal claims.[2] In the following statistical summary, the defendant's responses are characterized as the percentage admitted, which includes all facts agreed to, regardless of agreement or dispute of materiality; the percentage denied with no rebuttal; the percentage with inadequate responses, that is, with evidence not in accordance with Rule 56(e); and the percentage of facts in genuine dispute. The percentages of responses which are combinations of the above categories are enumerated. The total percentage for the number of facts undisputed or deemed admittable because of inadequate rebuttal are also included.

---

[1] For the convenience of the Court, plaintiffs have placed the evaluation of defendant's response after each of the material facts, in dark type. Plaintiffs have prepared as narrative and statistical evaluation of defendant admissions, including those facts in genuine dispute in attached appendix entitled "Plaintiffs" Statistical and Narrative Evaluation of Defendant's Reponses to Plaintiffs' Material Facts."

[2] See Narrative Evaluations

Combined Percetages for Defendant's Responses to Plaintiffs' Material Facts	1251 Facts
Admitted	61.1%
Denied, no rebuttal	16.2%
Inadequate response	11.2%
Genuine dispute	1.0%
Admitted/Denied, no rebuttal	5.4%
Admitted/Inadequate response	3.7%
Admitted/Genuine dispute	0.24%
Denied, no rebuttal/Inadequate response	1.0%
Genuine dispute/Inadequate response	0.16%
Total undisputed or inadequate response	97.8%

Department of Health and Human Services	250 Facts
Admitted	55.2%
Denied, no rebuttal	18.8%
Inadequate response	9.6%
Genuine dispute	1.2%
Admitted/Denied, no rebuttal	11.2%
Admitted/Inadequate response	3.2%
Admitted/Genuine dispute	.8%
Total undisputed or inadequate response	98.0%

St. Ann's Infant and Maternity Home	119 Facts
Admitted	83.2%
Denied, no rebuttal	1.7%
Inadequate response	8.4%
Genuine dispute	0%
Admitted/Denied, no rebuttal	0.4%
Admitted/Inadequate response	3.4%
Admitted/Genuine dispute	2.5%
Total undisputed or inadequate response	97.5%

Family of the America's Foundation	183 Facts
Admitted	63.9%
Denied, no rebuttal	15.8%
Inadequate response	9.3%
Genuine dispute	1.1%
Admitted/Denied, no rebuttal	3.3%
Admitted/Inadequate response	3.8%
Admitted/Genuine dispute	1.1%
Genuine dispute/Inadequate response	0.5%
Denied, no rebuttal/Inadequate response	1.1%
Total undisputed or inadequate response	97.2%

Catholic Charities of the Diocese of Arlington	165 Facts
Admitted	88.5%
Denied, no rebuttal	4.8%
Inadequate response	0.6%
Genuine dispute	0.0%
Admitted/Denied, no rebuttal	4.8%
Admitted/Inadequate response	1.2%
Total undisputed or inadequate response	99.9%

Catholic Family Services of Amarillo, Texas	27 Facts
Admitted	25.9%
Denied, no rebuttal	7.4%
Inadequate response	25.9%
Genuine dispute	7.4%
Admitted/Denied, no rebuttal	29.6%
Admitted/Inadequate response	3.7%
Total undisputed or inadequate response	92.6%

Catholic Social Services of Wayne County	32 Facts
Admitted	65.6%
Denied, no rebuttal	0.0%
Inadequate response	15.6%
Genuine dispute	0.0%
Admitted/Inadequate response	18.8%
Total undisputed or inadequate response	100%

Search Institute	61 Facts
Admitted	50.8%
Denied, no rebuttal	3.3%
Inadequate response	19.7%
Genuine dispute	1.6%
Admitted/Denied, no rebuttal	3.3%
Admitted/Inadequate response	13.9%
Admitted/Genuine dispute	4.9%
Genuine dispute/Inadequate response	3.3%
Total undisputed or inadequate response	91.0%

St. Margaret's	219 Facts
Admitted	57.0%
Denied, no rebuttal	35.2%
Inadequate response	2.3%
Genuine dispute	0.5%
Admitted/Denied, no rebuttal	4.6%
Admitted/Genuine dispute	0.5%
Total undisputed or inadequate response	99.6%

SeMo Association of Public Health Administrator	21 Facts
Admitted	23.8%
Denied, no reouttal	47.6%
Inadequate response	19.0%
Genuine dispute	9.5%
Total undisputed or inadequate response	90.5%

SUMA/Good Samaritan	16 Facts
Admitted	43.8%
Denied, no rebuttal	12.5%
Inadequate response	25.0%
Genuine dispute	0.0%
Admitted/Denied, no rebuttal	18.8%
Total undisputed or inadequate response	100%

Lutheran Family Services	28 Facts
Admitted	53.6%
Denied, no rebuttal	10.7%
Inadequate response	25.0%
Genuine dispute	0.0%
Admitted/Inadequate response	10.7%
Total undisputed or inadequate response	100%

Thirteen small grantees (Lyon County Health Department; Tucson Unified School Districts, No. 1; Community Health Clinics, Inc.; Northwest Louisiana Adolescent Family Life Project; Memorial General Hospital; Camden County Department of Health; Maternal and Child Health; Department of Health, Hawaii; Hill Health Corporation; Charles Henderson Child Health Center; Cities-in-Schools; School of Public Health, Department of Health Education, University of South Carolina; CEMP Counseling Services Department (Guidance Center); Norfolk State University (City of Norfolk); St. Mary's Hospital.) 131 Facts

Admitted	40.5%
Denied, no rebuttal	16.0%
Inadequate response	33.6%
Genuine dispute	2.3%
Admitted/Denied, no rebuttal	1.5%
Admitted/Inadequate response	5.3%
Admitted/Genuine dispute	0.76%
Total undisputed or inadequate response	97.7%

AFFIDAVIT OF DR. JAMES E. DITTES

I, Dr. James Dittes, declare the following is true under penalty of perjury:

1. I am a professor of pastoral theology and psychology at Yale Divinity School, 409 Prospect Street, New Haven, Connecticut. My degrees include both a doctorate in psychology and a degree in divinity from Yale University. I have taught at the Yale Divinity School for over 30 years. I directored the Ph.D. program in religion at Yale University from 1968–1975, and was chair of the department of religious studies from 1975 to 1982. I am an ordained minister in the United Church of Christ denomination.

2. I served on the Board of Directors of Search Institute for 8 years ending in 1982. Thereafter, I was on the Advisory Board of Search until approximately 3 years ago when I became a member of the Board of Directors again.

3. Approximately 3 years ago, I gave an affidavit in support of plaintiff's motion for summary judgment because I believed that the AFLA grant award for sex education curriculum was intended by Search to further a particular religious mission; but that opinion was limited to the then present status of Search under its president at that time.

4. During the three years since my earlier affidavit, I have remained an active member of the Board of Directors of Search Institute, attending every meeting of the Board, and observing first-hand major and sweeping changes in the organization directly relevant to the subject of that affidavit, namely the religious characteristics of the organization I perceived at that time. Those changes are:

a. The president has been replaced.
b. Several senior staff member, including those I most associated with religious tendencies of the organization, are no longer employed.

c. Some 50% of the present Board consists of members new since three years ago.
d. There has been a major financial and corporate restructuring.
e. Policies separating the organization from religious purposes have been explicitly adopted by the Board of Directors.
f. The educational project on teen-age sexuality has been completed, so that the product can now be appraised objectively, rather than surmised at, as was necessary three years ago.

5. As a result of these changes, I make the following judgments about the organization, Search Institute:

a. I sense no religious idealogy or mission prevailing in the activities or publications of the organization.
b. There is no test of religious affiliation or persuasion, explicit or implicit, for membership on the Board of Directors or employment on the staff.
c. There are no religious or quasi-religious practices included in meetings of the Board of Directors.
d. The products of the organization, in particular the educational material on teen-age sexuality, do not reflect or coincide with the idealogy or preferences of any identifiable religious group and do not suggest religious sanctions or bases for its presentations.

6. This Affidavit is given to clarify my previous affidavit and to support the exclusion of Search from the purview of this Court's April 15, 1987 Order.

FURTHER AFFIANT SAITH NOT.

/s/ JAMES E. DITTES
James E. Dittes

Subscribed and sworn to before
me this 20th day of May, 1987.

/s/ ANDREA CRISCUOLI
Notary Public

My Commission Expires March 31, 1989.

World Organization Ovulation Method – Billings, U.S.A.
May 23, 1982

EXECUTIVE BOARD
Mrs. Mercedes Wilson, Director

His Eminence
James J. Card. Knox
President
Pontifical Council for the Family
Vatican City

Your Eminence:

We would like to thank your Eminence for your time and for listening to our plans for the Second International Congress for the Family of the Americas:

In order to encourage the attendance to the Congress of carefully chosen dedicated pastoral workers; we humbly request from your Eminence the following:

* * * * *

2) A letter that should encourage funding from Catholic foundations in the U.S., Canada, and Europe to this special pastoral Congress for the family that will bring together some of the most competent leaders in the spiritual, scientific and pastoral field.

Our efforts are of a lay organization, strongly committed to the implementation of the teachings of Humanae Vitae and Familiaris Consortio. We are confident that your help, cooperation and prayers will ensure its success.

Yours faithfully,

/s/ MERCEDES WILSON
Mercedes Wilson

FAMILY OF THE AMERICAS FOUNDATION, INC.
World Organization Ovulation Method – Billings, U.S.A.

August 3, 1983

Mr. Charles E. Costello
Mission Director
Agency for International Development
Guatemala City, Guatemala

Dear Mr. Costello:

Enclosed please find the proposal for a teaching and training program on the Billings Ovulation Method of Natural Family Planning, in the amount of $123,552.00.

* * * * *

The reasons given for denial of funding before were due to an internal regulation of AID's policy which required that organizations such as ours would have to provide all methods of artificial birth control or agree to refer couples to other entities that provided them. This we refuse to do for the following reasons:

1) *Because of our religious beliefs,* we cannot provide nor refer couples to programs that offer artificial methods of birth control, sterelization and abortion.

* * * * *

Thank you for your attention to this important project for Guatemala.

Yours sincerely,

/s/ MERCEDES A. DE WILSON
Mercedes Arzu de Wilson

FAMILY OF THE AMERICAS FOUNDATION, INC.
World Organization Ovulation Method – Billings, U.S.A.
The Christian Alternative
308 South Tyler Street, Covington, Louisiana 70433
(504) 892-4046

December 2, 1983

His Holiness
John Paul II
Vatican City
Europe

Most Holy Father:

As evidence to counteract more earnestly the forces of evil being promoted through liberal-leftist elements around the world, please note the enclosed articles in *The Humanist* magazine. I am sure Your Holiness is familiar with "The Humanist Manifesto" whose leaders are the writers of the enclosed articles and magazine. It is interesting to appraise that their number one target is the Catholic Church.

Please observe the type of 'anti-Catholic' propaganda that takes place in the United States. Please note that Walter Mondale's brother, Lester Mondale, is one of the principal proponents of this propaganda against the Church. Walter Mondale is the leading candidate for the Democratic Party in next year's (1984) Presidential election in the United States against President Reagan. Your Holiness will be interested to see the strong connection that exists between the Humanists and Planned Parenthood. The articles denote a vicious attack on the Catholic Church, particularly on population policies in defense of the family, which are totally opposed to theirs.

* * * * *

Yours sincerely in the Lord,

/s/ MERCEDES A. WILSON
Mercedes Arzu Wilson
Director

Outline of St. Margaret's Religious Curriculum

St. Margaret's Hospital for Women
Boston, MA 02125

GRADES: TEN – ELEVEN – TWELVE
NUMBER OF STUDENTS: _____
SCHOOL: _____
INSTRUCTORS: _____
DATES: _____
TIMES: _____

I. INTRODUCTION:
- ☐ A. Purpose of Program
- ☐ B. Need for Correct Factual Information
- ☐ C. Effect of the Media

II. PERSONHOOD:
- ☐ A. Appreciation of Our Sexuality
- ☐ B. Self Worth and Uniqueness
- ☐ C. Decision-Making and Accepting Responsiblity
- ☐ D. Seeking Christian Values
- ☐ E. Love: Conditional – Unconditional – Christian

III. HUMAN GROWTH and DEVELOPMENT:
- ☐ A. Male Anatomy
- ☐ B. Female Anatomy
- ☐ C. Conception – Birth
- ☐ D. Fertility Awareness

IV. BIRTH CONTROL:
- ☐ A. Introduction
  - ☐ Function
  - ☐ Use
- ☐ B. Risks
- ☐ C. Catholic Church's Teaching and Philosophy

V. ABORTION:
- ☐ A. Definition of Life and Abortion
- ☐ B. Moral Dilemma and Consequences

V. ABORTION – Continued:
- ☐ C. Methods of Abortion
- ☐ D. Risks and Future Consequences
- ☐ E. Reason Teenagers choose to Abort

VI. ??????????????????:
- ☐ A. Description of m??? prevalent Diseases
- ☐ B. Transmission
- ☐ C. Symptoms
- ☐ D. Treatment

VII. DECISION-MAKING as an ADOLESCENT:
- ☐ A. Gathering Good Information – Lifetime Ramifications
- ☐ B. Reasons for the Choice – Direction
- ☐ C. Decisions based on Own Personal Set of Standards
- ☐ D. Developing God-given Talents
- ☐ E. Seeking Christian Goals

VIII. ALCOHOL:
- ☐ A. Factual Information regarding Alcohol
- ☐ B. Chemical Components of Alcohol
- ☐ C. Relationships in Alcohol
- ☐ D. Alcohol and Teenagers
- ☐ E. Resources

IX. DATING:
- ☐ A. Respect of Self and Others
- ☐ B. Peer Pressure
- ☐ C. Group Dating – One-to-One Dating – Non Dating
- ☐ D. Parents and Regulations

X. SEXUAL ACTIVITY AMONG TEENAGERS:

☐ A. Peer Pressure—"Saying NO to Sexual Pressures"

☐ B. Medical Risks

- ☐ Pregnancy
- ☐ V.D.

☐ C. "Virginity is Normal"

XI. CONCLUSION:

☐ Communicating with Parents

MATERIALS: _____

_____

Excerpts from St. Margaret's Religious Curriculum

. . . undergoing the same confusing changes as you are and have the same questions and concerns as you, but might not want to admit it. What might your friends do? (Elicit: Make up an answer.) Thus, you may well be receiving incorrect information. Who are the people most likely to have the correct answers? (Brainstorm and elicit: parents, informed adults, etc.) Your parents are a good source because they are concerned about you and will try to get the best information possible for you.

C. Effect of the Media

Many persons have influence on you as you are developing your ideas and values about sexuality. You receive many messages about sexuality from television shows, movies, magazines, the radio, the newspapers, and in advertising. Sometimes these are good sources of information, but other times the messages may not be accurate or present sexuality as special and important. As you mature be aware that often shows we see on television or at the movies are not real life but make-believe and do not present sexuality as *God* intended.

II. PERSONHOOD:

Objective: To assist the student in appreciating himself as a person of worth with the ability to make decisions and assume responsibility for those decisions.

A. Appreciation of the Total Person

When we talk about the person we often look at the outside of the person, forgetting that

there is much more to him/her. I have brought a model of the person with me to help you understand. It is not a statue or a skeleton, but a "person box". (See Appendix 6-I.) Look in the mirror and see yourself as others see you—the outside, physical or exterior you. It is important to care for this physical layer of the person by eating well, getting plenty of exercise and rest, etc. When you open the box, or get to know more about the person, what do you think will be inside? That's right—your feelings!

Activity: Have students brainstorm on board various feelings.

Emotions/Feelings are a very important part of you, the person. Now that you are maturing it is important to learn how to control these feelings. (Have a scarf with various emotions written on it and pull it from the box.) As you get deeper into the person, there is another layer—your talents, goalsm dreams and memories. (Have an old snapshot for "memory" and pull it from the box.)

Everyone is different because the things that happened to them in the past are different, and their dreams and goals for the future are different. Everyone needs a dream or goal to look forward to achieving. You have all been given different talents and abilities which will help you reach these goals.

There ai still another layer of the person. Can anyone guess? That's right—the heart. (Pull a heart out of the box.) The center of your being, your heart or soul, is where God is in each one of us. You can see that now the box is empty. The physical, outside layer is still

there, but without all the other layers, it is just an empty shell. You are so special because you have all these layers within you. Jesus taught you to love yourselves and your friends because within each one of you is God's love. That is why you must be careful in judging others or in being unkind to them.

B. Self Worth and Uniqueness

Each person is very special or UNIQUE. Because of God's love for us, no two people have been created exactly the same. Even if you had a twin brother or sister who looked like you, your fingerprints, thoughts, dreams, and personalities would be different. That is a greater thought to appreciate: There never was, or ever will be, anyone just like you.

I would like you to do an activity sheet alone, and then we will compare them to notice the differences.

Fill in sheet "MY FAVORITES" or "WHAT DO I VALUE?" (Appendix 6-II) We can see from comparing these sheets that no two people are the same. The reason they are all unique or different is that each person has different parents as well as different backgrounds. Learn to appreciate that you are special because you are different.

C. Decisionmaking, and

D. Developing Responsibility

You are growing in many ways—emotionally, intellectually, spiritually, and physically. You are now becoming aware of your abilities. Perhaps some of you are good students or athletes, or a caring friend. Keep developing these talents God has given you.

You are now making choices and decisions and accepting responsibility for these decisions. For Example: If you don't do your homework, it is you, not your parents, that have to stay after school. It is not always easy to make the right decision.

As you are maturing, you also have new responsibilities. What are some things you can do now that you could not do in the first or second grade? (Teacher brainstorms with students.) What does it mean to be responsible?

We are going to see a film about a girl your age who has to make a decision and is pressured by others. See if you think she made the right decision.

Show film, "I THINK".

Discuss the effect of peer pressure on the decision-making process.

E. Effects of Peer Pressure

The film you saw showed Linda being pressured by whom? (Her friends and her mother.) Was it difficult for her to make the decision contrary to what her friends wanted? How did she feel? Did she make the right

choice? Why? (Students will say she made a commitment and accepted responsibility, and was aware of the feelings of others.)

Have you ever been in a situation when you had to have the courage to do what you thought was right, instead of what everyone else wanted? Life is full of decisions, some easy, others more difficult. Now is the time to begin to think what is important to you and not necessarily always going along with your friends—to be your own person.

F. Seeking Christian Values and Goals

You may be hearing or seeking different messages than the ones you have been receiving from your parents. Movies, music, and television programs also influence your attitudes and values. Ask yourself—What is the message being given? Is this real or make-believe? Is this movie or program helping me to become a better Christian? Talk over these thoughts with your parents and keep seeking the truth. Appreciate that the values given to you by your parents are good. You are striving to become a loving person who cares for others.

III. PUBERTY AND ADOLESCENCE:

Objectives:
1) To assist the student in appreciating that the age of puberty varies with each individual and to understand the changes that will be taking place.
2) To assist the student in understanding the anatomy and physiology of the male and female reproductive systems.

We have been talking about you, the person, and how you are maturing, and now we will begin to talk about the physical changes that will be occuring in your life. We will be separating the boys and girls because other students your age have told us they feel more comfortable talking about sexuality in separate groups. You will be hearing the same information and seeing the same materials.

We are here today to talk about what topic? "SEX". Yes, but even more important – SEXUALITY. Sexuality is everything about you. Sexuality is natural and beautiful. It is the way you look, talk, walk, think, play and pray. Sex refers to whether you are a boy or a girl. You have been a sexual person since the moment your life began, but your parents did not know whether you were a boy or a girl until the time of your birth.

Many people have influenced your sexuality. First, you received messages from your parents and family, perhaps by the way treated you or the clothes or presents given to you. For example: boys are usually given trucks are girls are given dolls, although there is no reason that this need be so. Other forces such as friends, school, peers, society, and the media also influence your idea of how you should be as a sexual person.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 83-3175

CHAN KENDRICK, ET AL., PLAINTIFF,

v.

DR. OTIS R. BOWEN, JR., SECRETARY OF THE DEPARTMENT OF HOUSING AND HUMAN SERVICES, DEFENDANT,

and

SAMMIE J. BRADLEY, ET AL., DEFENDANT-INTERVENOR

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

Reverend Bruce Ritter, President of Covenant House, being duly sworn deposes and says:

1. The needs of pregnant teens and adolescent parents are staggering; the needs of those who are also homeless are even more so. The Covenant House Adolescent Family Life Project presently meets these needs at our three components which are located in New York City; Houston, Texas; and Fort Lauderdale, Florida. Presently two hundred and two (202) pregnant and/or parenting homeless teens and their children are helped through this project. In addition, thirty eight (38) teen fathers, and other family members are provided with counseling and supportive services.

2. The Covenant House Adolescent Family Life Project, as with all Covenant House programs, accepts young

people in need regardless of race or religion. When they come to us, the young mothers and pregnant girls are alone, hungry, and fearful for themselves and their children. Many have run away from home because of parental abuse; others have been pushed from their homes because of poverty or family strife. Some have been told to leave because they are pregnant; still others have become pregnant after being exposed to the horrors of the streets: the drug pusher, the pimp, the con-artist.

3. Covenant House has a comprehensive program for Adolescent Family Life participants which focuses on rebuilding the self esteem of these troubled youth and which attacks the underlying issues leading to teen pregnancy. Services are provided not only while in residence, but for a two year follow up period after the young mother has been reunited with her family or placed in another stable living situation. These services are provided by Covenant House Adolescent Family Life Project staff, which includes health and social work professionals and numbers thirty six (36) full and part-time workers; or, through referral to other appropriate community agencies. Included are the following:

Health: pre-natal, post-natal and pediatric care; screening for venereal disease.

Health Education: human sexuality, responsible decision making regarding sexual activity, pregnancy, infant care, nutrition.

Educational/Vocational: return to school, preparation for or completion of General Equivalency Diploma (GED), job readiness, job training, job placement.

Life Skills: negotiating the social services system, budgeting, locating day care, family relationships, finding an apartment.

Religious Services: Although religious services of varying denominations are available to youth in all Covenant House programs, it is not mandatory for them to attend.

Also, the other services provided are delivered in an atmosphere free of religious overtones. It is a strong policy of Covenant House not to proselytize.

4. The Covenant House Adolescent Family Life Projects helps young parents to attain adequate levels of well being, enables them to maintain those levels and to improve the stability and self sufficiency of their lives. Without the financial support of the Office of Adolescent Pregnancy Programs, Covenant House will be unable to continue to meet the many needs of a most vulnerable population: Homeless, pregnant, parenting teens.

/s/ REVEREND BRUCE RITTER
Reverend Bruce Ritter

Sworn to before me this
23rd day of April, 1987

/s/ EDMUND J. BURNS
Edmund J. Burns
Notary Public

AFFIDAVIT OF CAROL A. BERVERA

I, Carol A. Bervera, Project Coordinator of the Adolescent Family Life Program at the Brightside for Families and Children am responsible for the day to day administrative, fiscal, programmatic and supervisory aspects of this program. This affidavit is made upon personal knowledge.

The Adolescent Family Life Program at Brightside has been severely affected by the court decision of United States District Judge, Charles R. Richey. The abrupt halt of funding, the lack of clarification of whether this decision takes effect as of April 15, 1987, the end of the current fiscal year or the end of the three year contract cycle has left our staff, clients, administration and Board in a state of uncertainty and confusion that undermine our ability to continue to provide services.

The administration and the Board of Directors of Brightside voted to allow this project to continue through the month of May. If a decision is not reached in court by May 31st, all staff of this Project will receive notification of termination of employment on June 1st. The agency, at great cost to its overall service delivery, is committed to a thirty day termination process for staff and clients.

Of the eighty-five families (and over 125 individuals) with whom we are currently working, we have begun to terminate twenty-five families who are at "least" risk. Please keep in mind that of the 500 or so families needing assistance we provide services to the 10% most high at risk. When using the word "least" it is in a relative sense. We are attempting not to close those cases where lack of medical care, abuse and battering, substance abuse and severe emotional crisis such as suicide attempts are still problems.

Because there are no case management services available in the community to whom we can refer these families, we feel compelled to begin some of our terminations in a

limited and planned manner immediately so that clients have sufficient time to adjust to this loss.

I am attaching a copy of adequacy of prenatal care utilization that was compiled for Massachusetts from 1981-1985. As you can see, Holyoke has the lowest rate of adequate prenatal care in the state; 52% compared to Newton with the highest at 92%. Holyoke is our community where we have worked so hard during this past year to attempt to impact on this problem. Cutting off funds abruptly, in the middle of the funding cycle, contributes to the oppression of a population of poor, young minority citizens.

The research component of the Adolescent Family Life Program will also be terminated when the Project is terminated. Not only is the teen Hispanic community underserved they are also understudied. If the program closes, even if it should re-open in the future the longitudinal aspect, vital to this research, would be lost.

Referral sources in the community have been informed that we can no longer accept referrals. During the first two weeks of May we had to refuse fifteen such requests. In addition, by the end of May we will begin to terminate the work we are doing at the Adolescent Clinic Prenatal Center where our nurse and social workers meet with teens and discuss decision-making, self-esteem, labor and delivery preparation, infant care and nutrition on a weekly basis. We will also terminate our program at the Holyoke High School Teen Clinic and the classes we are teaching at the Pregnant and Parenting Class at the high school.

We have begun to terminate our membership in the Service System that provides advocacy for pregnant and parenting teens in the areas of education, mental health and health care.

Finally, the staff, demoralized by the impact of all of this, have of necessity begun to look for other employ-

ment. Hiring a bilingual and bilingual/bicultural staff has been the work of almost a year.

/s/ CAROL A. BERVERA
Carol A. Bervera, M.S.W.

Signed and sworn to before me this 18th day of May, 1987.

Commonwealth of
Massachusetts
County of Hampden

/s/ PATRICIA A. REILLY
Patricia A. Reilly,
Notary Public
My Commission Expires
June 6, 1991

ADEQUACY OF PRENATAL CARE UTILIZATION FOR MASSACHUSETTS RESIDENTS 1981 THROUGH 1985 FOR THE 25 CITIES WITH THE LARGEST NUMBER OF BIRTHS RANKED BY 1985 ADEQUACY OF PRENATAL CARE UTILIZATION

PERCENT ADEQUATE PRENATAL CARE UTILIZATION

CITIES/TOWNS	1981	1982	1983	1984	1985
Holyoke	61.4	60.8	43.4	51.4	52.2
Lowell	55.2	64.3	64.6	68.7	63.2
Lawrence	71.4	67.5	70.3	70.9	63.5
Fall River	62.4	63.8	66.3	66.2	66.3
Fitchburg	71.3	63.1	69.6	69.9	67.2
Springfield	78.0	72.6	61.5	68.8	67.9
Taunton	78.8	76.0	73.6	70.1	69.3
New Bedford	81.5	73.1	64.7	65.2	69.6
Boston	72.3	74.8	77.3	78.8	71.8
Lynn	78.7	72.5	68.1	71.8	73.2
Pittsfield	83.6	81.8	80.5	79.1	74.1
Plymouth	82.1	83.5	78.8	78.1	75.7
Chicopee	81.5	78.4	66.1	75.4	76.4
Sommerville	80.5	81.4	80.5	78.9	76.9
Worcester	80.5	79.3	78.9	80.1	80.0
Haverhill	80.4	75.5	81.5	79.3	80.0
Malden	81.5	80.3	84.1	79.2	80.0
Medford	85.9	85.3	86.1	83.3	80.0
Cambridge	79.0	81.2	78.2	83.0	81.9
Waltham	84.6	86.6	86.5	86.1	86.2
Weymouth	87.8	86.8	92.0	89.4	87.4
Quincy	84.9	86.5	88.4	88.5	89.1
Framingham	86.6	92.7	88.5	91.0	91.8
Newton	89.5	88.3	88.1	92.3	92.2
Massachusetts	83.0	82.3	79.8	79.7	78.6

Data Source: Division of Health Statistics and Research
Massachusetts Department of Public Health

Data Analysis: Division of Family Health Services
Massachusetts Department of Public Health

DEPARTMENT OF
HEALTH, EDUCATION AND WELFARE
PUBLIC HEALTH SERVICE
OFFICE OF ADOLESCENT PREGNANCY PROGRAMS

NOTICE OF GRANT AWARD

AUTHORIZATION (Legislation/Regulation)
Legislation – P.L. 97-35 – Title XX of the Public Health Service Act

1. Date Issued: 09/30/82
2. Federal Catalog No.: 13.995
3. Supersedes Award Notice dated _____ except that any additions or restrictions previously imposed remain in effect unless specifically rescinded.
4. Grant No.: APH 000705-01-0
5. Administrative Codes: APH 59
6. Project Period: From 10/01/82 through 09/30/85
7. Budget Period: From 10/01/82 through 09/30/83
8. Title of Project (or Program): Bootheel Adolescent Family Life Project
9. Grantee (Name, Organization Unit, Street, City, State and Zip Code): SeMo Association of Public Health Administrators, Inc.; 515 First Street, P.O. Box 805, Kennett, Missouri 63857
10. Director of Project (Program or Center Director, Coordinator or Principal Investigator): Name: Campbell, Larry; Address: Same
11. Approved Budget (Excludes PHS Direct Assistance)
    I ☐ Grand Funds Only
    II ■ Total project costs including grant funds and all other financial participation

a. Personal Service	$ 79,566
b. Fringe Benefits	18,968
c. Consultants	0
d. Travel	3,850

11. Approved Budget – Continued:

e. Equipment	1,000
f. Supplies	1,000
g. Contractual	21,500
h. Patient Care	0
i. Construction (A & R)	0
j. Trainee Costs	0
k. Other	10,000
l. TOTAL DIRECT COSTS	$135,884
m. Indirect Costs (Rate 16.9% of S&W)	$ 13,446
n. TOTAL APPROVED BUDGET	$149,330
o. Federal Share:	$100,000
p. Non-Federal Share*	$ 49,330

* Must meet all matching or cost participation requirements. Subject to adjustment in accordance with PHS policy.

12. Award Computation for Grant:

a. Amount of PHS Financial Assistance (from 11.o)	$100,000
b. Less Unobligated Balance From Prior Budget Periods	0
c. Less Cumulative Prior Award(s) This Budget Period	0
d. AMOUNT OF THIS ACTION	$100,000

13. Recommended Future Support (Subject to the Availability of funds and satisfactory progress on the project).

	Budget Year	Total Direct Costs
a.	02	$100,000
b.	03	95,000

14. Approved Direct Assistance Budget (in Lieu of Cash)
    a. Personal Services ..... $
    b. Travel .....
    c. Vaccine .....
    d. Other .....
    e. TOTAL DIRECT ASSISTANCE . $ 0

15. Program Income Subject to 45 CFR 74.45 Shall Be:
    a. ☐ Used to further the objectives of the legislation under which the grant was made.
    b. ☐ Deducted from total project costs for the purpose of determining the net costs on which the Federal share of costs shall be based.
    c. ■ Other – See Special Conditions.
    d. ☐ NA

16. This Grant is subject to the terms and conditions incorporated either directly or by reference in the following:
    a. The grant program legislation cited above.
    b. The grant program regulation cited above.
    c. This award notice including terms and conditions, if any, noted below under Remarks.
    d. PHS Grants Administration Manual Chapters in effect as of the beginning date of the budget period.
    e. PHS Grants Policy Statement in effect as of the beginning date of the budget period.
    f. 45 CFR Part 74.

In the event there are conflicting or otherwise inconsistent policies applicable to the grant, the above order of precedence shall prevail. Acceptance of the grant terms and conditions is acknowledged by the grantee when funds are drawn or otherwise obtained from the grant payment system.

Remarks (*Other Terms & Conditions Attached* – ■ Yes ☐ No)

AGENCY OFFICIAL *(Signature, Name and Title)*

/s/ DONALD A. UNDERWOOD
Donald A. Underwood,
Grants Management Officer, OAPP

17. PHS List No.: AP 82-09 – Obj. Class: 41.45
18. CRS – EIN: 1237314085A1
19. Organization Descriptors:
20. a. FY-CAN: 2-A730130
    b. Document No.: APH 000705A
    c. Secondary Adm. Code:
    d. Amt. Action Fin. Asst.: $100,000
    e. Amt. Action Dir. Asst.: $0

PHS-5152-1 (REV 12-76)
(NOTE: See reverse for payment information)

PARENT SEXUALITY EDUCATION WORKSHOP
A Revised Curriculum
December 1983

This curriculum is for a 6 hour intensive learning and motivational experience for parents. It is designed to assist parents in developing open and honest relationships with their children. Emphasis is placed on factual sexuality education, responsibility and self-esteem building.

Premise: The child who has an open and honest relationship with parent or parents, factual sexuality knowledge and high self-esteem is less likely to be involved in a teen pregnancy, tends to delay sexual activity and tends to adopt parental sexual values.

Goals:
1. To convince parents to become the primary sexuality educators of their children.
2. To promote the 4 point strategy for children's sexuality education.
3. To provide educational resources.
4. To provide examples of the effective strategies for teaching responsibility and self-esteem.
5. To negotiate family contracts or educational plans that are measurable and realistic with built-in 6 month evaluations.

ORGANIZATIONAL FACTORS AFFECTING WORKSHOP SUCCESS:

1. Time factors. The workshop curriculum is divided into three distinct sessions. These sessions are best presented on separate nights, one week apart, which will allow time for the participants to reflect on the material presented and to complete homework assignments in preparation for the succeeding sessions. Workshop leaders should start and end the workshop sessions in a timely fashion, allowing individuals who have questions to remain behind for explanations.

2. Setting. The setting for the workshop sessions should provide privacy and freedom from noise. The setting should be informal, preferably with a circle arrangement. The leaders should not stand, but should sit with the participants to dramatize the point that workshop leaders are parents as are the participants, and that everyone present is involved in an exercise in improving our mutual effectiveness in helping our children feel better about their sexuality and to take the responsibility for their sexual functioning.

3. Group size. Workshops are designed for no less than 10 participants and no more than 20 participants. It is to be an intimate, informal experience in learning and sharing.

4. Group composition. Participation in the workshop is not limited. The leaders do encourage that both parents participate when possible. Participation by males is strongly recommended, since the double standard is such a strong factor in sexual functioning of youth in this society. Participation by both parents serves to enhance sexuality education in the home. Our program recognizes this and hopes to increase total parent participation by offering a reduced rate for couples.

5. Participation of adolescents. It is not recommended that adolescents participate in Sessions I and II. The purpose of the workshop is to motivate parents. The participation of adoles-

cents would tend to defeat our goal of encouraging parents to become the primary sex educators of their children. If parents wish to involve their children in the third and final session of the workshop, that is acceptable.

6. Target population. Since the goal of the workshop is to prevent inappropriate teen pregnancy, it is obvious that the primary target population is parents of very young children, since open and honest relationships on such taboo subjects as sexuality is most easily developed when the child is very young. The workshop is also quite relevant to parents of adolescents and sexually active teenagers, because it offers the opportunity to share experiences and to discuss techniques and strategies for teaching young people responsibility and facts about sexuality. Adults of all ages can benefit from participation in the workshop since adults of a variety of ages can have significant impact on the sexuality education of youngsters with whom they come in contact.

7. Materials and equipment required. Audio-visual equipment should include, at a minimum, an overhead projector, a 16 mm sound projector and a blackboard and chalk. The workshop handbook, pencils and educational resources are also a necessity. The workshop leader is encouraged to have all these materials organized and prepared well in advance of the opening of the first session.

8. Registration. It is important that registration activities be completed prior to the opening of the first session. All participants should be registered in advance and receive their workshop packets.

9. Cost. cost of the workshop is $10.00 per participant and $15.00 for couples. The reason for this charge is two-fold. a) .Individuals who make a financial commitment in advance are more likely to complete the workshop. b) By making a token payment, which only pays a share of the cost for the workshop, the individual is acknowledging that there is value in participating. This is a very important psychological aspect of the workshop and should not be overlooked in generating effective compliance with workshop goals and guidelines.

SEXUALITY EDUCATION: THE PARENT'S RESPONSIBILITY
SESSION I–WHY TEACH SEX EDUCATION?

I. Introduction

A. Statement of Purpose: As Session I of the workshop opens, one of the leaders will introduce him/herself and immediately give to the participants the following statement of purpose:

"We are here tonight to help each other to become better sexuality educators for our children. Our children learn about sex from a variety of sources; friends, literature, school and from some places we'd rather they didn't receive sexual information. Unfortunately, we as parents have not aggressively worked to become the primary sex educators of our children. We have set a pattern of allowing our children to learn about sex from other people and at the same time learn other people's values and ethics as they relate to sexual function. We firmly believe that families who talk openly and honestly with their children about sexuality and teach them responsibility and values have a better opportunity for helping their children to make good decisions–responsible decisions about sexuality. Preliminary research shows that in such families, children tend to adopt their parents' sexual values. They tend not to be involved in teen pregnancy and, perhaps most importantly, they tend to delay their first sexual activity. These are goals that all of us want for our children. In this workshop, we will be learning about techniques and strategies that can help us to achieve these goals with our children. After all, if our children can talk to us openly and honestly about questions that relate to sexuality, then there is no subject that we

cannot learn to talk about with them. Our capacity to help them solve their problems in growing up is increased in this way. No subject is taboo in this workshop. Anything you want to ask we'll be happy to talk about, openly and honestly. We don't have all the answers . . . we're not experts . . . but we do have access to resources, and together we will find the answers. Let's begin by completing an exercise that will help us know more about what you would like to get from this workshop."

B. Pre & Post Test: At this time the attached pre & post test is distributed to all participants. They are instructed to complete the form by indicating their identification number which is included with their workshop packet. They are to indicate where the workshop is located, the date and their sex and age. The first form on the pre & post is a collection of sociodemographic data such as: the occupation of parents, the yearly household income, the educational level attained, the number and ages of children and the participant's race. The material collected on this form is utilized by the project researchers to develop baseline data about participants in the workshop so this data may be compared with the outcome of the other evaluation tools over the term of the project. The second page of the pre & post test is made up of a subjective evaluation of the participant's comfort level with the thirteen topical areas to be covered during the workshop on human sexuality. This form will be completed again at the end of the workshop in order to indicate the participant's view of how the workshop has helped him to feel more comfortable with the subject matter.

The third page of the pre & post test is the 10 True & False questions designed to measure objectively the participant's knowledge base on human sexuality prior to the workshop and at the completion of the workshop. The participants should be advised that this material will not be reviewed by the workshop leaders but is being used for national research in the effort to reduce teen pregnancy.

II. Icebreaker

It is recommended that the following icebreaker be used at the beginning of the first session. It has proven effective in setting the mood for an appropriate learning experience.

One of the leaders should tell the participants the following:

"Before we get started, maybe it's important that we learn a little about each other. Let's begin by sharing our name and three nice things about ourselves. I'll begin."

The last person to participate in this icebreaker should be the other workshop leader, with the purpose being to create, by his or her statement of three nice things, vulnerability to make the point that in this workshop it is O.K. to share personal experiences and be vulnerable with parents on the subject of sexuality. This exercise can be utilized by the leaders to identify persons in the workshop who are most likely to actively participate and those who have low self-esteem and need to be drawn into the discussions with small successes.

III. Why Teach Sex Education?

A. Teen Sexuality Test (10 minutes to take test, 45 minutes total with discussion.)

The Teen Sexuality Test has been developed as an educational tool to assist parents in understanding the severity of the problem of teen pregnancy in America and Southeast Missouri. The purpose of giving this test is to convince the parents that teen pregnancy is a local problem that is not limited to low income people or people of different ethnic background. At the end of the test discussion, all the participants should be motivated to learn more about how to prevent inappropriate teen pregnancy. The copy of the test is provided as an attachment. After the test is completed, the leaders take turns in leading a discussion on the answers to each of the questions.

B. Everyone is a Sex Educator

This exercise, which is attached, is designed to convince participants that regardless of our attitudes toward sexuality education, we are all acting as sex educators in our lives. It is not a question of whether we will teach sex education to our children, but whether we will do it effectively and with some conscious effort in order to make sure the educational experience is a positive one, based on facts and with good self-esteem. During the exercise, the participants are broken up into small groups who discuss the various examples. They choose a leader to report to the larger groups just what they feel the impact of this particular example might have been on the child involved. Invariably, participants will bring up similar examples

from their own experience. This is to be encouraged, since it initiates the process of group resolution of problems associated with sexuality education in the home.

BREAK– – – – – – – –

At this time a 10 minute break is declared. Leaders encourage participants to use this break to examine some of the resource materials and booklets which are on display at the workshop.

IV. Why Parents Avoid Sexuality Education

A. Sexuality Communication Questionnaire

This short questionnaire is given to the participants with instructions that they complete it in the privacy of their own home with their spouse prior to the second session of the workshop. The purpose of this form is to help parents recall their own experience as adolescents in finding out about sexuality. We want them to be able to have a better understanding of what children go through in a sexual society that is not open to honest discussion about sexual questions. By understanding their own negative experience on sexuality education they will be better able to relate to the material in Session II which provides detailed information about sexual functioning and information.

B. Barriers to Communication

Barriers to communicate are most often categorized as inexperience, embarrassment, and misconceptions associated with the transfer of sexuality information. The leaders will direct the group's discussion toward an examination of each of these excuses for not giving sexuality

information. The leaders will point out that all of us were inexperienced with regard to sexuality education because few of us had parents who provided a role model for distribution of sexual information. Embarrassment is addressed through a discussion of the fact that it is not necessary for the parent to be comfortable with the subject. In fact, it may improve the quality of conversation with the youngster for the child to know talking about this subject is difficult for the parent, but because the parent feels love and concern for the child, it is a subject they must discuss openly and honestly. Misconceptions with regard to sexuality education include such factors as the parent's belief that they must be an expert or the fear they can tell a child too much and cause the child to begin experimenting with sexual activity. Other parents feel that you should wait until the child asks. This section of the workshop is designed to allow the participants to reach the conclusion that there are no excuses that are valid when it comes to sexuality education. Children learn about sexuality in our society, but most often they learn misinformation or incomplete information and too often they receive that information from people who don't share their parent's moral or ethical values about sexual functioning. The leaders should emphasize regardless of how difficult it is, it's the parent's responsibility to be the role model for children's sexual education.

V. 4 Point Strategy to Effective Communication

The Parent Sexuality Education Workshop is based upon this 4 Point Strategy. The 4 Point Strategy of teaching children facts, values, expectations and responsibilities and self-esteem. This portion of the

workshop should be a discussion with the participants following this basic presentation on the 4 Point Strategy. We believe that parents who talk to their children openly and honestly about sexuality, tell them the truth and who tell them what they believe and what they stand for are more likely to have children who adopt their parent's values, who delay their sexual activities and who tend not to be involved in teenage pregnancy.

We've broken this strategy down into four simple components. We'll discuss each of them briefly.

1. FACTS: We believe that children deserve to have the facts in answer to their questions about sexuality. In this society we tend to go out of our way to keep from giving children information about sexuality, in spite of the fact that peer pressure, literature, media and other people in our communities are actively involved in transferring a variety of sexual information to children every day. Much of that information is incorrect, much of it is only partially correct. If children are to make good decisions as adults about things such as refrigerators or cars, they need to have the best available information and advice about how to comparison shop, how to look into consideration of options and performance. In other words, we want our children to make economic decisions that are wise and just and responsible. But in the sexual arena, we go out of our way not to give children information and yet, the decisions they make about their sexual functioning are more important than the economic decisions and they, too, need to be based on honesty, wisdom, justice and responsibility. If our children are to make such decisions, they need to have the facts; even when the facts are not pleasing to us as parents.

Throughout the workshop we will insist that children deserve to have facts in answer to their questions. This practice will keep them coming to their parents as a source of knowledge in all areas of their lives.

2. VALUES: Many decisions about human sexual functioning require more than facts if we're to make the right decision because sexuality often involves ethics, morality and integrity. These are values and children have to learn values. If we want our children to make good decisions, then we need to give them facts, but we also need to let them know about a set of values that we believe in and that we know will help our children make good decisions that are rewarding and responsible. The schools and other institutions in the community can effectively transfer knowledge, but it's very difficult for them to transfer values. Parents, on the other hand, have the primary responsibility for teaching values to children. This second component of the 4-Point Strategy is to make sure that children get not only the facts, but how parents believe the facts should be applied and what they stand for, believe in and value regarding sexuality.

3. EXPECTATIONS AND RESPONSIBILITIES: Children should learn early that in the sexual arena, just as in any other facet of their lives, they have to be responsible. They should know that anything they do will have consequences and that they are responsible for the actions. In America, 85% of the boys who get girls pregnant, eventually abandon the girl. That is a reflection of a lack of responsibility. It means that young men are not willing and are

not trying to make decisions in advance about the consequences of their actions and then make responsible decisions relative to those actions. If we expect our young people to exhibit this kind of responsibility, we must tell them, in no uncertain terms, what we expect of them and what their responsibilities are. From a very early age, we must insist they pay the consequences for their actions and accept responsibility for what they do.

4. SELF-ESTEEM: There seem to be two common characteristics of children who get pregnant early. They are limited sexual knowledge and low self-esteem. Logically, if we can help children to feel better about themselves and their bodies and help them set realistic life goals, they will be less likely to jeopardize their own goals and their own respect for themselves and their bodies by being involved inappropriately in teen pregnancy. The second fact of self-esteem development deals with the fact that in our society, sex is considered dirty or bad. Quite to the contrary, sex is a beautiful and important part of the human experience. It is only the way we look at sexuality that makes it dirty. As parents, we must help our children to have a positive attitude toward themselves and their bodies. They must have a positive attitude toward individuals of the opposite sex. Young people who learn about sex in an environment that is positive are more likely to pride themselves on that aspect of their experience and be responsible in how they use their sexuality.

At this time the leaders will tell the participants:
"This, then, is our 4-Point Strategy. Throughout this workshop, we will be discussing techniques and strategies for teaching children about sexuality by using this plan. Whatever the question their child might ask, we feel that it can be most effectively answered by making sure that, first of all, we answer it honestly and completely. We must be sure to let the child know how we feel about it. We must let the child know what our expectations are and what his responsibilities are. Finally, we must give all this information in a way that makes the child feel good about himself. Now that you know our 4 Point Strategy, do you have some ideas about how we can begin to talk about using this strategy to answer some of the questions that your children have asked that you found difficult to answer?"

The participants should be advised that later in the workshop, we will be asking them to give examples of how difficult questions about sexuality could be dealt with according to this 4-point strategy. At this point, the leaders will hand out a list of questions by 5th and 6th graders from the local community regarding sexuality. The participants are requested to take this list of questions home and examine in their own minds how they would have answered those questions using the 4-point strategy, had it been their own child asking the question.

VI. Outline of next two sessions

The leaders will hand out the curriculum outline for the next sessions which includes the 13 sexual topics about which every child should know. Most of the questions parents have about teaching children sexuality are covered within this 13 topic area. By handing this form out at the end of the first sessions, it helps the participants know that their own concerns are going to be dealt with in some detail in the second session. They are encouraged to develop in their own minds a list of questions they would most like to have answered for presentation at the second session.

SEXUALITY EDUCATION: THE PARENT'S RESPONSIBILITY
SESSION II – COMMUNICATING SEXUALITY

I. Introduction

A. Statement of Purpose: As Session II of the workshop opens, one of the leaders will give the following statement of purpose:

"The purpose of tonight's discussion is to provide basic facts that children need to know about sexuality, to explore myths, and to stress the proper terminology that should be used with children about sexuality and to provide a variety of educational resources that can be used by the parent in the home. During tonight's session we will be discussing sexuality in a variety of areas and we will be using the proper names for sexual body parts and functioning. You are encouraged to ask any questions about any of these topics which you feel are appropriate. Those we cannot answer we will assist you in finding the answers to.

II. Warm-up exercises

The warm-up exercises here are designed to set the mood for an intimate discussion of sexual functioning in a wholesome and appropriate atmosphere to make the point, by example, that the family can discuss sexuality as a family unit with dignity and in a wholesome nature without embarrassment, just as they would discuss any other subject.

A. When should Sex Education begin?

1. Role play of toddler questions: At this time the leaders will lead a discussion by demonstrating typical questions asked by very young children about sexuality and humorous ways we parents often answer, or fail to

answer, these questions. The purpose of this role playing discussion is to help parents feel comfortable with the idea of talking about sex in general.

B. How to handle 4-letter words

During this brief discussion the leaders will demonstrate effective ways to deal with young children and their use of 4 letter words. The technique to be utilized is to simply repeat the word and ask the child if they know what it means. Then tell the child what the word means and they, as parents, do not approve of that word. Parents should then give them other words they may use as substitutes. In this example the leaders are careful not to present the information in an accusatory way but rather to use the 4 point strategy in conveying methods by which to handle these situation.

III. Talking to Teens About Sex

This exercise is designed to provide parents with some guidelines that will help them in beginning a conversation with children about sexuality. It helps them to better understand the indications that a child, especially teenagers, needs information, about sexual subjects. The handout is for use and review at home following the second session.

IV. What every child should know about sex

The 13 topics included in this session are topics that every child should know about. When our nurses talk to young people in the schools they find that children of very young ages ask very explicit questions about the subject matter on this list. Invariably, they find it difficult to get information on

the subjects from adults and, in particular, from parents. The purpose of our discussion of these topics is to go over the kinds of information the children should receive and talk about some techniques for transferring that information.

The outline for each of the subjects is provided in the workshop packet but should be used by the participants as a reference guide since the workshop leaders will be covering the information in the packets as well as additional information under each of these topics. The leaders should encourage active participation in the discussion by participants. Invariably, this second night of the workshop involves a good deal of sharing of personal experiences by parents of adolescents on many of these subject areas. The leaders should be aware that participants may vary in their beliefs about sharing information about these topics, since many of the topics are controversial. Workshop leaders are not to share their values on any of these topics but to encourage parents to understand that their values are what are most important and are the values that should be shared with their children. If we find individuals who do not accept the facts outlined in the curriculum, we tell them simply that children have to live in a real world. If we give them only the facts that we like, our children will find out soon enough that their parents did not deal with them honestly on these subjects. We feel that it is much better to share the facts, even if you don't agree. Then you can tell the child that you do not agree with the facts or that your values do not support those facts.

Participants should be encouraged to give examples of how they would discuss these topics using the 4 Point Strategy.

SEXUALITY EDUCATION: THE PARENT'S RESPONSIBILITY
SESSION III – BUILDING SELF-ESTEEM

I. Introduction

A. Statement of Purpose: As Session III of the workshop begins one of the workshop leaders will make the following statement of purpose:

"The purpose of tonight's discussion is to provide sexuality education in ways that build self-esteem."

II. Film and Discussion

A. Film: 'A Family Talks About Sex'
Produced by Wexler Films
Distributed by Perennial Education, Inc.
477 Roger Williams
P.O. Box 855 Ravinia
Highland Park, IL 60035

'A Family Talks About Sex' offers a variety of responses to sexuality education. It gives examples of how families like you and I might respond to the young person's questions about sexual issues. But more importantly it helps us see parents transferring sexuality information in a way that helps children feel good about themselves and their bodies, in a way that teaches them responsibility. If you watch carefully, you will see the parents depicted in this film transferring information to their children in accordance with the 4-point strategy. in almost every instance they talk about the facts, their values, what their responsibility to the child is and this is all done in a way that helps the child feel good about him/herself. Adequate time for discussion of the techniques depicted in the film and the self-esteem development should be allowed following the film.

III. Participant questions: Applying the 4-point strategy

At this time, immediately after the discussion of the film, it is appropriate to ask the participants to contribute questions anonymously that they would most like to have answered about sexuality. The workshop leaders will then lead a discussion of how these questions might best be answered, using the 4-point strategy. Gradually, the participants will be pulled into this example of using the strategy.

IV. Post Test

During this period, the participants will once again take the 10 question True & False test and, once again, they will complete the subjective evaluation of their comfort level with regard to the 13 topical areas of Session II. These will be completed and submitted for review by the project research team.

V. Defining goals and action steps

At this point, the workshop leader should explain just exactly what is expected of the participants.

In the workshop we attempt to motivate people to become the primary sexuality educators of their children. We ask them to give consideration to the use of a 4-point strategy which combines facts with values, responsibility and self-esteem. All of these things, of course, are aimed at improving children's sexual knowledge and improving their self-esteem as tools to assist them in delaying sexual activity and preventing inappropriate teen pregnancy. If we are to be successful, we must ask the participants to aggressively adopt a plan of action or make a contract with themselves to outline, in measurable terms, exactly how they are going to use the knowledge gained in the workshop to improve communication and education with their own children. At this point the

forms are handed out and the participants are asked to complete what they plan to do about sexuality education in their own family, state when they will begin and to outline their specific goals for sexual communication within the family over the next 6 months. This is a two part form. One part is kept by the participant, and the other copy is returned to the workshop leader. Participants are advised that the leaders will contact them after 6 months to find out how well they did in achieving their goals. The leaders also offer additional resources or assistance throughout the 6 month period at the request of the participant. If the appropriate environment and relationships have been established, participants should, routinely, avail themselves of these resource materials during this 6 months trial period.

VI. Workshop evaluation

At this conclusion of Session III the workshop evaluation forms are given to the participants for completion.

This concludes the Parent Sexuality Education Workshop.

YOUTH RESEARCH QUESTIONNAIRE

Date __/__/__ Sex: M F Birthdate __/____/__
mo./day/yr.

PLEASE DO NOT PUT YOUR NAME ON THIS FORM!

Please circle T (True) or F (False) according to the way you feel about each statement below.

T	F	1.	Often, people who have venereal diseases are unware they have it.
T	F	2.	A women has a safe time when she cannot get pregnant for about two weeks following her period.
T	F	3.	Research shows that pornography increases sex crimes.
T	F	4.	Sexual contact between adolescents of the same sex is a fairly normal occurrence.
T	F	5.	Masturbation does not impair mental or physical health.
T	F	6.	Most child molesters are neighbors, relatives, or friends.
T	F	7.	Menstruation can occur as early as eight years of age.
T	F	8.	Wet dreams are common in both boys and girls.
T	F	9.	Withdrawal is an effective form of birth control.
T	F	10.	Sperm enters the uterus through the fallopian tubes.

What question about sexuality would you most like to have answered?

DEPARTMENT OF HEALTH & HUMAN SERVICES

Public Health Service
Office of the Assistant
Secretary for Health
Washington, D.C. 20201
APH 000711-02-0

September 12, 1984

Sister Kathleen Natwin
Administrator
St. Margaret's Hospital for Women
90 Cushing Avenue
Boston, Massachusetts 02425

Dear Sister Natwin:

We have received your August 2, 1984 letter in formal response to our letter to you of April 16, 1984. In your letter, you state that St. Margaret's Hopsital "is currently able to provide expanded program services in public school settings such that Federal grant funds will be utilized solely in the public school settings."

We understand your letter to mean that the Title XX grant awarded by this office to St. Margaret's Hospital is no longer connected in any way with the presentation of your Family Life Education program in Boston area parochial schools, including the use of matching funds. We further understand your letter to mean that, where Title XX grant funds are being used by St. Margaret's in its Family Life Education Program, either in public schools or private, nonsectarian schools, the curriculum being presented has been formally submitted to this office for its prior review and is devoid of any religious references or teachings.

If our interpretation of your letter is incorrect in any way, please advise us.

Thank you for you cooperation in this matter.

Sincerely,

/s/ MARJORY MECKLENBURG

Marjory E. Mecklenburg
Deputy Assistant Secretary for
Population Affairs

DEPARTMENT OF HEALTH & HUMAN SERVICES

Public Health Service
Office of the Assistant
Secretary for Health
Washington, D.C. 20201

October 12, 1984

Sister Betty Ann McNeil
St. Ann's Infant & Maternity Home
4901 Eastern Avenue
Hyattsville, Maryland 20782

Re: APH 000105-30-0

Dear Sister Betty Ann:

I am pleased to approve your request for continued support from the Office of Adolescent Pregnancy Programs (OAPP) for the period from October 1, 1984 through September 30, 1985. The enclosed Notice of Grant Award (NGA) provides formal notification of the OAPP support and includes the terms and special conditions of the grant.

We ask that you review carefully all terms and conditions of the grant award and notify us promptly should you require clarification. There are several new standard conditions which should be particularly noted. In accordance with item 16 on your Notice of Grant Award, you will indicate your acceptance of the grant terms and special conditions by obtaining funds from the grant payment system. Please also carefully review your approved budget and notice especially that the travel allowance only include travel to official OAPP meetings and that which is necessary to provide the services proposed by the project.

Your attention is called to grant conditions #s 10 thru 13. We understand there may be a problem with regard to the service covered by condition #11. Please review this area and provide us with a plan by November 15 which would address any problems. If you need assistance, please call me at 202/245-6335.

In addition, it is our understanding that the Center for Life has made available two books to participants in the AFL project which would not be consistent with grant condition #10. These books, *Sex, Love, and Believing Girl* and *The Good News About Sex* have been reviewed by our attorneys and they have determined that they are not appropriate for inclusion in a Federally funded program. Accordingly, you should take appropriate steps to insure that these books will not be used in any way as part of the Title XX program at St. Ann's.

Please feel free to contact this Office at any time if you need assistance. We look forward to a productive year and wish you success in implementing your project.

Sincerely,

/s/ DONALD UNDERWOOD
for
Majory E. Mecklenburg
Deputy Assistant Secretary for
Population Affairs

Enclosure

DEPARTMENT OF HEALTH & HUMAN SERVICES

Public Health Service
Office of the Assistant
Secretary for Health
Washington, D.C. 20201

October 12, 1984

Ms. Susan Lax
SUMA (Services for Unmarried Parents and
Specialized Adoptions)
1216 E. McMillan
Cincinnati, Ohio 45206

Re: APH 000106-03-0

Dear Ms. Lax:

I am pleased to approve your request for continued support from the Office of Adolescent Pregnancy Programs (OAPP) for the period from October 1, 1984 through September 30, 1985. The enclosed Notice of Grant Award (NGA) provides formal notification of the OAPP support and includes the terms and special conditions of the grant.

We ask that you review carefully all terms and conditions of the grant award and notify us promptly should you require clarification. There are several new standard conditions which should be particularly noted. In accordance with item 16 on your Notice of Grant Award, you will indicate your acceptance of the grant terms and special conditions by obtaining funds from the grant payment system. Please also carefully review your approved budget and notice especially that the travel allowance only include travel to official OAPP meetings and that which is necessary to provide the services proposed by the project.

Since this is the last year of your demonstration project, we are looking forward to receiving the final evaluation report. It is important that the reports contain the data for the full year from October 1, 1984 to September 30, 1985 and that the analysis of the data which affects factors in the evaluation take into consideration data from all years of the grant. In your contract this year for the independent evaluation, please be sure you allow the contractor time beyond September 30 to analyze the data and prepare the evaluation report. The final reports are due within 90 days after the end of the project period and should be submitted to the OAPP Grants Management Office.

Your attention is directed to condition #10: "the grantee will not teach or promote religion in the AFL Title XX program. The program shall be designed so as to be, to the extent possible, accessible to the public generally." In one of the documents you provided us, there was a reference to spiritual counseling services provided by the Inter-Parish Ministry. If this is part of your project, it is *not legally permissible* in a federally funded project and you should revise the project accordingly.

Please feel free to contact this Office at any time if you need assistance. We look forward to a productive year and wish you success in implementing your project.

Sincerely,

/s/ DONALD UNDERWOOD
for
Majory E. Mecklenburg
Deputy Assistant Secretary for
Population Affairs

Enclosure

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 83-3175

CHAN KENDRICK, ET AL., PLAINTIFFS

v.

MARGARET HECKLER, SECRETARY OF THE DEPARTMENT OF HEALTH AND HUMAN SERVICES, ET AL., DEFENDANT

DECLARATION OF THOMAS F. DUNCAN, M.D.

Thomas F. Duncan M.D., declares and states as follows:

1. I am the Medical Director, a position I have held since January, 1984, at St. Margaret's Hospital for Women in Dorchester, Massachusetts ("the Hospital"). I have been a member of the Medical Staff since 1950. I have personal knowledge of the matters set forth herein.
2. This Declaration responds to certain of the statements contained in the Affirmation of Louis Laz, M.D. (date not legible) ("Laz Affirmation" or "Laz Aff."), documents which, I understand, have been submitted by the Plaintiffs in this case.
3. The Hospital is licensed as, and operates as, a general hospital, although its primary service is in the specialized area of obstetrics and gynecology. The Hospital has a substantial Pediatrics Department (Neonatology). Its Neonatology Unit is the second largest such Unit in the Commonwealth of Massachusetts and it accounts for approximately thirty (30) percent of all of the patient days at the Hospital. Statements in the Laz Affirmation with

respect to the nature of the Hospital's operations (Laz Aff. ¶ 3) are, therefore, erroneous.

4. Patients who come to the Hospital receive accurate medical information concerning treatment. This is true for adolescents in the Hospital's Teenage Pregnancy Program who are offered specific education programs. With respect to pregnant women, it has been our experience that teenage patients are fully aware of their options and generally would not be coming to the Hospital unless they wanted to deliver their child. Any teenager seeking pregnancy testing is given some basic knowledge about pregnancy and all questions are answered. I, therefore, disagree with Dr. Laz's unsubstantiated conclusion that the adolescent patients "receive skewed, misleading and sometimes erroneous medical information . . .", etc., that patients are ill-informed about their options, or that patients have no other choice for care once enrolled at St. Margaret's. (Laz Aff. ¶ 2, 6A). The care given the patient at the Hospital remains within good standards of medical practice and within the guidance of the religious directives.
5. Moreover, based upon my experience at the Hospital, I disagree with Doctor Laz's conclusion that the options of sterilization and abortion "are critical for the vast majority of obstetrical or gynecological patients".[1] (Laz Aff. ¶ 6A) I disagree with the conclusions of Doctor Laz that the Hospital patients are "ignorant" or become "completely dependent" on the Hospital as the exclusive source of information on the medical issues discussed. Many teenagers are referred to

[1] Contrary to the implications in Doctor Laz's Affirmation (¶ 6D), the Hospital performs no abortions.

St. Margaret's from other agencies for care in the pregnancy they wish to continue. Most teenagers seeking services travel to and from St. Margaret's by Hospital van for school or independently by public transportation for health services. The nearest referral and service center for the full range of family planning is two blocks from St. Margaret's on a major road and on a bus line.

6. Doctor Laz's statements concerning Hospital policies with respect to pregnancy are inaccurate. I dispute his unsupported conclusion that the hospital's treatment of the fetus "often imperils women's health and lives". (Laz Aff. ¶ 6B). Physicians at St. Margaret's consider that they are caring equally for two human beings, both mother and fetus. The well being of the unborn child is of importance regardless of the age of gestation.
7. Doctor Laz also misstated the Hospital's policy on when a fetus is declared to be dead. (Laz Aff. ¶ 6D). At one point in time, during the early stages of ultrasound technology, there were two tests one week apart required at the Hospital to determine the death of the fetus. Improvements in the technology, however, have obviated the need for this approach.
8. Doctor Laz also has misstated the Hospital's current policy on ectopic pregnancy (Laz Aff. ¶ 6E). We similarly disagree with Doctor Laz's conclusion that a D & C would always be required to make a diagnosis of ectopic pregnancy since ultrasound is frequently used. If ultrasound exam reveals no pregnancy sac, a D & C would be performed in that instance.
9. Doctor Laz also misstated the Hospital's policy concerning the baptism of premature or stillborn

babies. (Laz Aff. ¶ 10.5). The policy of the Hospital is that if the baby is of Catholic parents and is in imminent danger of death, then the baby is baptized. If the parents are non-Catholic, one parent must request baptism, or it is not performed.

10. Although Doctor Laz states in his Affirmation that the Hospital's "impositon of . . religious directives caused (him) great conflict" (Laz Aff. ¶ 6), Doctor Laz sought after his position at the Hospital after having had significant exposure to the Hospital during his medical School Program. He remained here for four years and never attempted to resign his residency at the Hospital.

I declare under penalty of perjury that the foregoing is true and correct.

THOMAS F. DUNCAN, M.D.

Executed this 2 day of May 1985 at Dorchester, MA.

n (6)

PLAINTIFFS' STATEMENT OF MATERIAL FACTS WITH PLAINTIFFS' CHARACTERIZATION OF DEFENDANT'S RESPONSE*

* * * * *

4. The religious positions of some official religious bodies are that abortion is a sin. The religious positions of some other official religious bodies deem that the choice to have an abortion is a religious choice and a matter of conscience. For the government to remove that choice violates religious tenets. Luxemburg dep. pp. 18-19; Exh. 5, p. 2-3; Exh. 6, p. 3; Defendant's Exh. 1 of Deposition of L. Buxton, Exh. 1-B of Goddard depo., General Resolutions of General Assembly of the Unitarian Universalist Association, 1981 (A., I, pp. 48-55) (Agree to first two sentences; as to third sentence, no rebuttal evidence submitted in accordance with Rule 56(e); dispute materiality)

5. For a religious denomination the question of the permissibility of abortion is answered by that group's theological teachings. Affidavits of Dean Wogaman, ¶ 5 (A., VI, pp. 217-220); Rabbi Feldman; ¶ 6 (A., VI, p. 138): Doctor Simmons, ¶ 10 (A., VI, pp. 69-72); Professor Harrison, ¶ 3 (A., VI, p. 142); and Fredrica Hodges, ¶ 4 (A., VI, p. 154) **(No rebuttal evidence submitted; dispute materiality)**

6. A denomination's theological teachings on the value of the fetus, as well as when the fetus attains personhood are, in part, determinative of that group's position on abortion. Affidavits of Wogaman (A., VI, p. 217-220), Feldman ¶ 7-8 (A., VI, p. 72) Simmons ¶ 6 (A., VI, p. 72), and Harrison ¶ 6 (A., VI, p. 142) **(No rebuttal evidence submitted; dispute materiality)**

7. Catholic Fundamentalist teachings on abortion also differ from mainstream Judaism and mainstream Protestantism as to the role of individual decision-making on this issue. Mainstream Judaism and Protestantism view

the decision to have an abortion as one conferred to the woman and her own religious conscience, whereas Catholicism and fundamentalism preclude such a choice. Wogaman (A., IV, pp. 217-220), Simmons (A., VI, pp. 73-74, and Feldman ¶ 13 (A., VI p. 139) **(No rebuttal evidence submitted; dispute materiality)**

8. Jewish religious teachings on abortion are based on the Five Books of Moses, the Mishnah and the G'mara and Responsa literature. Feldman Aff. ¶ 6 (A., VI, p. 138). **(No rebuttal evidence submitted; dispute materiality.)**

9. Mainstrean Jewish religious teachings on the status of the fetus hold that personhood is not attained until birth. Under both Orthodox and mainstream Jewish law, abortion can never be murder. Feldman Aff., ¶ 7-8 (A., VI, p. 138), and *Marital Relations, Birth Control and Abortion in Jewish Law*, Feldman (1968) pp. 259-260 (A., VI, pp. 174-175) **(As to first sentence no rebuttal evidence submitted; as to second sentence no rebuttal evidence submitted in accordance with Rule 56(e). Dispute materiality. The statement cited by defendant of Rabbi Bleich is qualified by him to distinguish feticide from murder—see S. S. Res. 119 and 130, 93rd Congress 2d Session Vol. 1 pp. 289-290, 316-317)**

10. Mainstream and Orthodox Jewish religious teachings, based on the Mishnah, hold that abortion is mandated when a women's life is threated by the pregnancy. Mainstream Jewish law also teaches that where a woman's mental health is at stake abortion is warranted. Feldman Aff. ¶ 9, 11 (A., VI, pps. 138-139); Agreed Statement of Facts Not In Dispute, #5, p. 2-3; American Jewish Congress, Resolution on Reproductive Freedom, 1982 (Defendant stipulates that AJC Resolution accurately represents AJC position on abortion); and *Marital Relations, Birth Control and Abortion in Jewish Law*, Feldman, at 281-284 (A., VI, pp. 176-179) **(No rebuttal evidence submitted; dispute materiality)**

11. A basic religious tenet of the United Methodist Church holds that individual freedom must be protected and that a woman's decision to have an abortion must be respected. Exh. 6, p. 3, Book of Discipline of United Methodist Church, Nashville, 1980, p. 91 (A., I, pp. 109-110) **(Agree; dispute materiality)**

12. The Unitarian Universalist Church believes that abortion is an individual, conscientious choice of the woman and must be respected. General Resolutions of General Assembly of the Unitarian Universalist Association, 1981 (A., I, pp. 186-187, 188-189) **(Agree; dispute materiality)**

13. Religious Coalition for Abortion Rights (RCAR) is an organization of various religious organizations whose religious tenets support the proposition of abortion as a pregnancy alternative and that a woman must be allowed the freedom of choice on that alternative. All member denominations of RCAR adhere to its purpose of educating the public about anti-abortion legislation as a threat to religious liberty. Hodges Aff. ¶ 3-4 (A., VI, pp. 153-154) **(No rebuttal evidence submitted; dispute materiality)**

14. Member denominations of RCAR include American Baptist Churches, U.S.A.; the American Jewish Congress; the Central Conference of American Rabbis; the Episcopal Church; the Lutheran Church in America; the Presbyterian Church, U.S.A.; the United Methodist Church; the Unitarian Universalist Association; Reorganized Church of Jesus Christ of the Latter Day Saints; and the United Church of Christ. Hodges Aff., Exh. A (A., VI, pp. 156-163) **(No rebuttal evidence submitted; dispute materiality)**

15. One religious tenet of the Roman Catholic Church is that a fertilized ovum is a person from the moment of conception and abortion is a sin. "Human life must be respected and protected absolutely from the moment of conception. Abortion is a direct violation of the fun-

damental right to life of the human being." Charter of the Rights of Family, issued by the Vatican in 1980 (A., I, pp. 85-88) **(Agree; dispute materiality)**

16. Another religious tenet of the Roman Catholic Church holds that "Sexual intercourse divorced from the context of procreation loses its significance, exposes the selfishness of the individual, and is a moral disorder." Vatican Congregation for Catholic Education entitled "Educational Guidance in Human Love," Nov. 1, 1983 (A., I, pp. 89-100) **(Agree; dispute materiality)**

17. Fundamentalist religious teachings hold that the conceptus has equal value and personhood to that of a woman and therefore abortion violates an absolute moral rule. Simmons Aff. ¶ 7 (A., VI, p. 73) **(No rebuttal evidence submitted; dispute materiality)**

18. The Church of Jesus Christ of the Latter Day Saints (Mormon) teaches that abortion is revolting and sinful and can never be allowed except in rare instances when a woman's life is threatened by the pregnancy, or the pregnancy is a result of rape or incest. Even under those circumstances, the Church places qualifications on the decision to have an abortion. Knauer Aff., Exh. A (A., VI, p. 152) and "Abortion—Part I: Hearings on S.J. Res. 119 and S.J. 130 Before the Subcommittee on the Judiciary, 93rd Congress, 2d Session, 318 (1974) Statement on behalf of the Church of the Latter Day Saints" (A., I, p. 84) **(No rebuttal evidence submitted; dispute materiality)**

19. Mormon teachings also hold that church members who encourage, perform or submit to an abortion must be disciplined by Church councils. Knauer Aff., Exh. A (A., VI, p. 152) **(No rebuttal evidence submitted in accordance with Rule 56(e); dispute materiality)**

20. The Southern Baptist Convention has propounded resolutions which oppose abortion in all instances except to save the physical life of the mother. Their official position states that ". . . The practice of abortion for selfish,

non-therapeutic reasons wantonly destroys fetal life, dulls our society's moral sensitivity, and leads to a cheapening of all human life. . ." Resolutions of Southern Baptist Convention, Nos. 13, 10 and 8, Exh. C of Simmons Aff. (A., VI, p. 136) **(No rebuttal evidence submitted; dispute materiality)**

21. The Lutheran Church-Missouri Synod has an official position that abortion is morally wrong. That church's theology states that "Life and death belong to the providence of God, and no person has the right to extinguish human life by a decision of his own, made apart from general precepts that express God's will; resolved that the Synod regard willful abortion as contrary to the will of God." Abortion—Part I: Hearings of S.J. Res. 119 and S.J. 130 Before the Subcommittee on the Judiciary, 93rd Congress, and Session, 321 (1974) (A., I, pp. 80-81) **(Agree; dispute materiality)**

22. The Lutheran Church-Missouri Snyod endorsed a human life amendment to the U.S. Constitution prohibiting abortion except "as a tragically unavoidable by-product of medical procedures necessary to prevent the death of another human being . . . the mother." Report of Endorsement of Human Life Amendment by the Lutheran Church-Missouri Synod (A., I, pp. 80-81) **(Agree; dispute materiality)**

The 1982 AFLA Religious Applicants

23. At least fifty of the 405 1982 AFLA grant applicants are explicitly identifiable as religious or religiously affiliated organizations. They are as follows:

1. Shepherd Care Ministers, Inc., Hollywood, Fl
2. Bethany Christian Services, Grand Rapids, MI
3. House of His Creation, Coatesville, PA
4. United Church for Biblical Witness
5. St. Joseph Hospital of Florence, Colorado, Inc.

6. St. Vincent Hospital and Medical Center
7. Catholic Charities, Worcester, MA
8. Catholic Charities of the Diocese of Albany
9. Catholic Charities of Springfield, IL
10. Catholic Family Services, New Haven, CT
11. Catholic Charities Diocese of Ft. Wayne
12. Catholic Social Service, Peoria, IL
13. Catholic Charities Centre of Old Colony Area
14. Catholic Charities of Syracuse
15. Catholic Cummunity Services Northwest
16. Home of Divine Providence, Inc., Wilmington, DE
17. Catholic Charities, Inc., Spokane, WA
18. St. Vincent Hall/Catholic Community Service
19. The Salvation Army, Grand Rapids, MI
20. Riverside Methodist Hospital, Columbus, OH
21. Catholic Family Services, Portsmouth, VA
22. Catholic Diocese of Memphis
23. Marygrove School, Florissant, MO
24. St. Vincent's Medical Center of Richmond, Staten Island, NY
25. Catholic Diocese of Trenton
26. Catholic Charities Diocese of Bridgeport
27. Catholic Community Services of San Diego
28. Christian Study Center
29. Catholic Diocese of Orange, Orange, CA
30. Catholic Social Services, Montgomery, AL
31. St. Elizabeth Home, Indianapolis, IN
32. Catholic Family Service, Inc.
33. Catholic Charities of Archdiocese of Chicago
34. Catholic Counseling Center, Cleveland, OH
35. Archdiocese of Washington, D.C.
36. Catholic Community Services Diocese of San Francisco
37. Catholic Home Bureau, Hampton, VA
38. Catholic Charities, Modesto, CA

39. Benedict College, Columbia, SC
40. World Organization Ovulation Method-Billings, Covington, LA
41. Merton P. Strommen, Search Institute, Minneapolis, MN
42. Lutheran Family Services
43. Catholic Charities Diocese of Arlington, Inc.
44. St. Ann's Infant and Maternity Home
45. Catholic Social Services of Wayne County
46. SUMA
47. St. Margaret's Hospital
48. St. Mary's Hospital
49. Brigham Young University
50. Catholic Family Services/Amarillo, Texas.

Underwood dep. Exh. 7 (A., I, p. 242B-242U) **(Defendant agrees listed organizations were 1982 applicants and that some are religiously affiliated. Defendant offers no rebuttal evidence that these organizations are not all religious and does not counter plaintiffs' proof on the 50 as contained in cites under paragraph 24.)**

24. Forty-nine of the fifty adhere to theological tenets against abortion. The nine 1982 AFLA applicants identifiable as Catholic and anti-abortion that are not identified in Schiff Aff. are:

Catholic Counseling Center
Catholic Social Services, Montgomery, AL
St. Elizabeth Home, Indianapolis
Catholic Charities of Archdiocese of Chicago
Archdiocese of Washington, D.C.
Catholic Community Service Diocese of San Francisco
Catholic Home Bureau, Hampton, VA
Catholic Charities, Modesto, CA

(See Rule 201 of the Federal Rules of Evidence, *United States v. Kahane* 396 F. Supp 687, 692 (E.D.N.Y. 1975), *mod. on other grounds*, 527 F. 2d 492 (2d Cir. 1975) where

Judge Weinstein took judicial notice, pursuant to Rule 201, *Fed. R. Evid.*, of the importance of dietary requirement in Judaism and *United States v. Dykema*, 666 F.2d 1096, 1104 (7th Cir. 1981) where the court accepted as "common knowledge" that vows of proverty have been known in Roman Catholic tradition for centuries.) See, Schiff Aff., ¶¶ 1-5 for proof on applicants 1-29 and 39 (A., VI, pp. 1-123); and Plaintiff's Statement of Facts, above *#24* and below #29-39; and Bordeau Aff. (A., VI, p. 164) for applicants #2, 31-38, 40-41, and 49; for applicants 40-48 and 50 see Plaintiffs' Statement of Facts for each named grantee. **(No rebuttal evidence submitted; dispute materiality). Hearsay is not applicable to these facts appropriate to be noticed under *Fed. R. Evid.* 201.)**

25. Thirty eight of these 1982 AFLA applicants are affiliated with the Roman Catholic Church and are opposed to abortion. Schiff Aff. ¶ 4 ¶ 3-6, 9, 11, 14-25 and ¶ 5 (A., VI, pp. 4-5, 7-8, 8-12, 12-13) and Plaintiffs' Statement of Facts above, #24. **(No rebuttal evidence submitted; dispute materiality) (Hearsay is not applicable to these facts appropriate to be noticed under *Fed. R. Evid.* 201.)**

26. The Protestant groups (with the exception of Riverside Methodist Hospital) who applied for AFLA grants in 1982 all adhere to conservative Christian tenets opposing abortion. They are as follows:

1. Shepherd Care Ministries
2. House of His Creation
3. United Church for Biblical Witness
4. Home of Divine Providence
5. The Salvation Army
6. Christian Study Center
7. Benedict College
8. Bethany Christian Services
9. Search Institute
10. Lutheran Family Services (a grantee)

See, Schiff Aff. ¶ 4, ¶ 1, 2, 7, 8, 10, 12, 26, and ¶ 5 for applicants 1-7 (A., VI., pp. 2-4, 6-7, 7-8, 12-13). Bordeau Aff. for applicant 8 (A., VI, p. 164), and for Search Institute and Lutheran Family Services, see Plaintiff's Facts on those programs. **(No rebuttal evidence submitted; dispute materiality). (Hearsay is not applicable to these facts appropriate to be noticed under *Fed. R. Evid.* 201.)**

27. In 1982, 9 religious organizations were funded for AFLA: 7 were Catholic, one Mormon, and one Lutheran-Missouri Synod:

Catholic Charities of the Diocese of Arlington Plaintiffs' Facts of CCDA #1-165)
Brigham Young University (Plaintiffs' Facts below, #29-37)
St. Ann's Infant Maternity Home (Plainttiffs' Facts on St. Ann's #1-119)
Lutheran Family Services (Plaintiffs' Facts on LFS, (#1-28)
St. Margaret's Hospital (Plaintiffs' Facts on St. Margaret's #1-219)
Catholic Social Services of Wayne County (Plaintiffs' Facts on CSS #1-32)
St. Mary's Hospital (Plaintiffs' Facts on St. Mary's, #1-4)
Catholic Family Services, Amarillo, Texas (Plaintiffs' Facts on CFS, #1-27)
The Good Samaritan Hospital/SUMA (Plaintiffs' Facts on SUMA #1-16)

(Defendant disputes that SUMA is religiously affiliated; agrees that all other organizations are religiously affiliated; no rebuttal evidence submitted; dispute materiality)

28. In 1983, 11 religious organizations were funded for AFLA grants, 8 were Catholic, 1 Mormon, 1 Lutheran and 1 conservative Christian:

Catholic Charities of the Diocese of Arlington
Brigham Young University

St. Ann's Infant Maternity Home
Lutheran Family Services
St. Margaret's Hospital
Catholic Family Services, Amarillo, Texas
Search Institute
Families of America Foundation (FAF)
Good Samaritan Hospital/SUMA
St. Mary's Hospital
Catholic Social Services of Wayne County

Plaintiffs' Statement of Facts on each grantee, as cited above in #27, and Plaintiffs' Facts, below #29-40. **(Defendant disagrees that Search Institute, SUMA and FAF are religiously affiliated; agrees that all other organizations are religiously affiliated; no rebuttal evidence submitted in accordance with Rule 56(e); dispute materiality)**

* * * * *

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

No. 83-3175

CHAN KENDRICK, ET AL, PLAINTIFFS

v.

MARGARET HECKLER, DEFENDANT

DECLARATION OF LARRY CAMPBELL

1. I am the Executive Director of SEMO Association of Public Health Administrators, Inc. ("SeMo"). SeMo operates the Bootheel Adolescent Family Life Project under a grant provided by the Department of Health and Human Services pursuant to Title XX of the Public Health Services Act. I personally authored the grant application. I have personal knowledge of the matters set forth in this declaration.

2. SeMo is a not-for-profit Missouri corporation. Its Board of Directors is composed of the Administrators of five Public Health Departments in the Bootheel area of Missouri.

3. SeMo is not affiliated with any religious or religiously-affiliated organizations or institutions.

4. SeMo's services are made available without regard to race, creed or economic status. SeMo does not inquire into the religious affiliation, or absence of religious affiliation, of its clients or prospective clients.

5. SeMo does not inquire into the religious affiliation, or absence of such, of its employees or prospective employees. Under the organization's personnel policies, in the employment process selection is made on the basis of merit and competence and regardless of race, color, religion, sex, national origin or age.

6. The Bootheel Project has, since its inception, attempted to work with the major civic and social institutions in the Bootheel area, including local churches and

religiously affiliated organizations in order to reach as wide an audience as possible for our program. It is our hypothesis that working with such civic and social institutions will permit the goals of the program to continue to be reached after Federal funding has ceased.

7. Our 1982 application stated that, as part of our overall effort to reach the community with our sexuality education, we would train instructors from area churches. However, this part of the program has never been implemented. No clergy and no church employees have been trained under this project.

8. Upon occasion, leaders of particular churches have indicated that they will allow SeMo to present its sexuality education programs through their organization only if the program is adapted to the particular teachings of their faith. We do not and have never presented our programs to such organizations unless they accept our program and curriculum as we have developed them.

9. My intent in writing the grant application was to convey a simple plan, to wit: involve the family and the churches, as civic institutions, in explicit sexuality education programs. The plan was not, and is not, to promote the views of the churches or a church on sex.

I declare under penalty of perjury, that the foregoing is true and correct. Executed on October 1, 1984.

/s/ LARRY CAMPBELL
Larry Campbell

State of Missouri)
County of Dunklin)

Subscribed and sworn to before me, a notary public, this 1st day of October, 1984.

Seal

/s/ DEBRA CAMPBELL
Notary Public

My commission expires September 24, 1987

EXCERPT FROM THE DECLARATION OF GAIL ZETTEL

* * * * *

[22] The Project has a policy of not permitting observers during group sessions. The only exception is made for staff members who are training. Various interested persons, e.g., school principals or community leaders, may attend a parent meeting to familiarize themselves with the materials and content offered. Sometimes these people are members of the clergy. At St. Christine's, where one of the first CASI presentations was held, the school principal (a nun) and the pastor did attend a group session without informing the Director beforehand. They were asked not to attend after that and complied with this request. A priest and nun did attend a general information meeting held at St. Gemma's School but did not attend the actual sessions.

* * * * *

EXCERPTS FROM THE DECLARATION OF LARRY WATSON

* * * * *

[13] Speeches concerning adoption have been made at 13 social service agencies, two state universities, three civic clubs, seven public schools, four hospitals, six churches, and at one public library.

[14] From the period of October 1983 through May 1984 personal visits presenting information concerning adoption and other services of the project have been made at approximately 24 public schools, 47 social service agencies, two colleges, nine hospitals, 32 churches, two civic groups, eight courthouses, two parochial schools, and eight radio and TV stations. These visits are representative of visits made throughout the period of the care and prevention project.

* * * * *

[19] Catholic Family Service has coordination of service agreements with the following agencies in the Panhandle-South Plains area:

Texas Department of Human Resources Protective Services

Juvenile Probation Office – Plainview
South Plains Health Providers – Plainview
Day Care Association of Lubbock
Terry County Juvenile Probation Department
Hockley County Juvenile Probation
Lubbock Right to Life
Lubbock City Health Department
Texas State Board of Health
South Plains Community Action – Levelland
Moore County Planned Parenthood Dumas Family Service Center
Texas Dept of Health Region I, Public Health Dumas Sub. Office

Northwest Texas Hospital
Amarillo College
Amarillo Bi-County Health Department
Texas Tech University Health Sciences Center
Public Health Region I, Texas Dept. of Health
Amarillo State Center
Dumas Family Services
Parenting Services, Inc.
Texas State Technical Institute
Potter County Juvenile Probation
Amarillo Public School System

* * * * *

STATE OF HAWAII
DEPARTMENT OF HEALTH
FAMILY HEALTH SERVICES DIVISION
MATERNAL AND CHILD HEALTH BRANCH
741-A SUNSET AVENUE
HONOLULU, HAWAII 96816

August 28, 1984

Joel M. Mangel
Deputy Assistant General
Counsel for Public Health
Dept. of Health and Human Services
Office of the Secretary
Office of the General Counsel
Rockvill, Maryland 20857

RE: Kendrick, et al., v. Margaret K. Heckler, et al., C.A. No. 83-3175 (D.D.C.)

Dear Mr. Mangel:

This letter is in response to correspondence dated July 30 and August 1, 1984, regarding information for the above mentioned case. All areas of inquiry are not applicable to Hawaii's Adolescent Family Life Project:

(1) The project is not affiliated with any religious organization;

(2) The grant application is without any religious, anti-abortion, or anti-contraceptive references;

(3) The project does not have any contractual agreement with religious organizations;

(4) The project has not presented any material or information to religious organization nor initiated correspondence with such organizations.

The Hawaii Adolescent Family Life Project is a community based program aimed at developing a case management model for pregnant and parenting adolescents, and is not concerned with curriculum design or reference materials.

Please accept my apology for the lateness of this response, however, Ms. Morales was on vacation and has subsequently resigned from her position as project director. I hope this information meets your needs.

Sincerely,
/s/ LORETTA FUDDY
Loretta Fuddy, ACSW, MPH

TUCSON UNIFIED SCHOOL DISTRICT
P.O. BOX 40400
1010 EAST TENTH STREET
TUCSON, ARIZONA 85717

August 13, 1984

Joel M. Mangel, Deputy Assistant
General Counsel for Public Health
Room 4A-53, Parklawn Building
5600 Fishers Lane
Rockville, MD 20857

Dear Mr. Mangel,

In response to your letters of June 25, 1984 and July 30, 1984 the following information is provided.

Interrogatory 1. The grant recipient is the Tucson Unified School District which is a public school and therefore has no religious affiliation or mission.

4. Attached are agreements between TUSD and Catholic Social Service (a division of Catholic Charities), Jewish Family Service and St. Elizabeth of Hungary Clinic. These agencies provide services as part of the funded program, as do four other local agencies which do not have any religious affiliation. The services which they provide are described in the proposal and narrative reports which have been submitted to OAPP.

5. There are no religious or spiritual services, lectures, or events provided as part of, or in conjunction with the funded program.

6. Counseling, health care, and/or instruction are provided at the three agencies listed in #4 above. There is a crucifix in the waiting room/lobby of Catholic Social Service but no religious symbols in the counseling area. A picture of St. Elizabeth of Hungary hangs in that Clinic, and there are some crucifixes also. Jewish Family Service has no religious symbols present.

7. None.

8. Although the official stand of CSS and St. E's is pro-life and anti-contraception other than natural methods, no materials are distributed or used which state this position.

9. None.

10. PSA's are in progress. They are described in the position paper on file with OAPP. No other tapes have been made.

Please contact me if I am able to provide additional information.

Sincerely,
/s/ SHERRY BETTS
Sherry Betts
PASAFE Project Director

EXCERPT FROM THE CAMDEN COUNTY ADOLESCENT FAMILY LIFE PROGRAM'S REPLIES TO INTERROGATORIES

1. The OAPP grantee is the Camden County Division of Health, which is a County agency without religious affiliation. Through the grantee, subcontracts utilizing OAPP funds are let to four hospitals, one prenatal clinic, two visiting nurse agencies and two universities. Of these nine subcontracts, two are to agencies which have religious affiliations:

—Obsorn Family Health Center/Our Lady of Lourdes Hospital. Osborn is a separately incorporated entity affiliated with Lourdes Hospital/University Medical Center, which is a Catholic Hospital associated with the Order of St. Francis.

—St. John the Baptist Prenatal Clinic, a prenatal clinic serving a largely Hispanic low-income population, affiliated with the Catholic Diocese of Camden.

4. Copies of the contracts with the two institutions indicated above are enclosed.

5. No religious or spiritual services, lectures or events are or have been provided as part of the OAPP funded program.

6. The Camden County Adolescent Family Life Program (CCAFL) provides teacher training for family life education, classes for youth on sexuality and family life, and parent education workshops on communicating with your child about sex. None of these have any religious orientation or content. The bulk of our work has been with County public schools, adult schools and professional agencies, but guest lectures have also been given in parochial settings. The content has been the same and makes no religious references.

7. As part of the CCAFL outreach, letters have been sent to all County schools, institutions, agencies, and clergymen offering parent education workshops to the

community they serve. In addition, occasional presentations are made before church related groups on topics of concern to CCAFL. (See attachments). None of these espouse, promulgate, or support any religious philosophy. They deal simply with the content of family life education, prevention of adolescent pregnancy, and related issues.

* * * * *

COVER PAGE OF THE CAMDEN COUNTY ADOLESCENT FAMILY LIFE PROGRAM

Progress Report

October 1, 1983-June 1, 1984

by

Ruth W. Salmon, Ph.D., Coordinator
with the assistance of

Sr. Marie deSales, St. John the Baptist Prenatal Clinic
Donna M. Fonte, Camden County Department of Health
Dalia Georgedes, Osborn Family Health Center/Our Lady of Lourdes Medical Center
Charlotte Furey, JFK Memorial Hospital/University Medical Center
Beth Kaplan, Cooper Hospital/University Medical Center
Natalie Phelan, West Jersey Health System
Raphael J. Salmon, Ph.D., Rutgers Regional Health Programs
Theresa Scholl, Ph.D., University of Medicine and Dentistry/New Jersey School of Osteopathic Medicine
Olga Kotalik, RN, MPH, Visiting Nurse and Health Association
Dr. Josephine Liebovici, Community Health and Nursing Services

Camden, New Jersey
June, 1984

EXCERPTS FROM THE 1983 PROGRESS REPORT OF CATHOLIC FAMILY SERVICES OF ARMARILLO, TEXAS

IV

COMBINATION CARE AND PREVENTION SERVICES PROJECT

The combined service demonstration project for CFS is designed to provide a combination of care and prevention services. The service is designed to provide services to adolescents and their families at various stages of the adolescents' sexual development.

* * * * *

PREVENTION SERVICE REPORT

1. To develop a curriculum for a series of youth symposiums entitled Teenage Sexuality and Decision-Making. To present six symposiums to reach 350 (75% = 263) adolescents and their families.

YOUTH SYMPOSIUMS

DATE	WHERE PRESENTED	TOPIC	TIME	PRESENT
4/17/83	Levelland	Sexuality & Decision-Making	6 Hours	23
5/1/83	St. John Neumann, Lubbock	Sexuality & Decision-Making	6 Hours	20
6/8/83	Spur	Sexuality & Decision-Making	6 Hours	30
9/17/83	St. Joseph's, Lubbock	Sexuality & Decision-Making	5 Hours	80
5/26/83	DHR Lubbock	Sexuality & Decision-Making	8 Hours	10
6/16/83				
6/30/83				
7/28/83				
9/24/83	San Jose School, Hereford	Sexuality & Decision-Making	4.5 Hours	25
9/27/83	Almo High	Sexuality & Decision-Making	4.5 Hours	60
	Retreat Center, Amarillo			
9/28/83	Potter County, Juvenile Detention Center, Amarillo	Sexuality & Decision-Making	4 Hours	4

TOTAL – 8 Symposiums to 252 youth.

2. To develop and offer ongoing community courses to encourage parents to assume the role as primary provider of sex education to you. To provide ten four-week courses to 200 parents (75% = 150).

PARENT COURSES

DATE	WHERE PRESENTED	TIME	PARENTS PRESENT
3/7/83	O.L.G. Church Station	8 Hours	20
3/14/83			
3/21/83			
3/28/83			
3/23/83	Levelland	6 Hours	30
3/30/83			
3/7/83			
4/6/83	St. John Neumann	8 Hours	20
4/13/83			
4/20/83			
4/27/83			
3/8/83	D.L. Guadalupe	6 Hours	18
3/15/83	Lubbock		
3/22/83			
3/28/83	Antonian Room	8 Hours	18
4/25/83	Hereford, Tx		

TOTAL – Five courses to 101 parents

Client Characteristics of Parents Attending Courses

	Amarillo	Lubbock	Total	%
Sex				
Male	6	26	32	32%
Female	7	62	69	68%
Ethnic				
Black	0	0	0	
White	11	30	41	40%
Hispanic	2	58	60	60%
Native American	0	0	0	
Asian/Pacific	0	0	0	
Other	0	0	0	

3. To provide counseling to 200 (75% = 150) "at risk" youth and their families referred by agencies, police, schools, parents, priests, and ministers as sexually active).

Client Categories at Risk Youth: Amarillo – 31
Lubbock – 12 Total – 43

Client Characteristics of At Risk Youth

	Amarillo	Lubbock	Total	%
SEX				
Male	0	0	0	
Female	31	12	43	100%
AGE				
Under 15	4	12	16	37%
15-18	19	0	19	44%
18	8	0	8	19%
				100%
ETHNIC				
Black	0	5	5	12%
White	20	3	23	53%
Hispanic	11	4	15	35%
Native American	0	0	0	
Asian/Pacific	0	0	0	
Other	0	0	0	
				100%

4. To provide 60 (75% = 45) public presentations to adult and youth organizations on the subject to Teenage Sexuality and Decision-Making, reaching 1,200 persons.

LUBBOCK PRESENTATIONS

DATE	WHERE PRESENTED	TOPIC	TIME	PRESENT
1/23/83	CCD Coordinators, Lubbock	Family Talks About Sex	1 hr	20
2/2/83	New Directions, Lubbock	Family Talks About Sex	1 hr	42
2/6/83	O'Donnell	Decision-Making	2 hr	20
2/9/83	DEBT Parents	Human Sexuality	1 hr	8
2/22/83	LIAC, Lubbock	Human Sexuality	1 hr	8
2/23/83	St. Josephs, Lubbock	Human Sexuality	1 hr	15
3/2/83	St. Josephs, Lubbock		1 hr	20
3/5/83	Parent Leaders Slaton	Human Sexuality	2 hr	8
3/9/83	Church, Brownfield	Human Sexuality	2 hr	50
3/15/83	Parent Meeting Ralls	Family Talks About Sex	2 hr	20
3/16/83	O.L.G., Lubbock	Human Sexuality	1 hr	25
3/24/83	Leader's St. John Numann	Human Sexuality	2 hr	8
3/27/83	St. Lawrence Youth Grp.	Teen Sex – Dec Making	5 hr	20
4/23/83	Spur	Family Talks About Sex	2 hr	60
4/23/83	Olton	Human Sexuality	2 hr	35
4/29/83	Community Action Staff	Family Talks About Sex Saying No		30

DATE	WHERE PRESENTED	TOPIC	TIME	PRESENT
4/30/83	Hispanic Women Caucus	Family	4 hr	60
5/7/83	Plainview-CCD Gathering		4 hr	30
5/25/83	Abernathy Church	Human Sexuality	2 hr	24
5/26/83	DHR Staff	Human Sexuality Presentation	1 hr	8
5/29/83	Spur	Roles & Sexual Responsibility	2 hr	15
6/2/83	Health Dept.	Teen-Age Pregnancy	1 hr	18
6/30/83	Health Dept.	Teen-Age Pregnancy	1 hr	17
7/8/83	Office, Lubbock	"Saying No"	2 hr	20
7/11/83	Office, Lubbock	"Saying No"	2 hr	10
8/3/83	Office, Lubbock	Teen-age Pregnancy	2 hr	6
9/14/83	New Directions	Teen-Age Pregnancy	1 hr	60

AMARILLO PRESENTATIONS

1/28/83	West Side Rotary	Teen Sex-Dec. Making/APCAPP	½ hr	100
2/7/83	Tx. Cattle Feeders – Adult	Teen Sex-Dec. Making/APCAPP	1.50 hr	25
3/1/83	APCAPP Adv. Comm. – Adult	Teen Sex-Dec. Making/APCAPP	2.50 hr	5
3/8/83	Pampa Dept. Hum. Res.- Adult	Teen Sex-Dec. Making/APCAPP	4 hr	10
3/10/83	HF&I Mother's Class	Teenage Sexuality	2 hr	13
3/27/83	St. Laurence Youth Group	Teen Sex-Dec. Making	5 hr	20
4/10/83	St. Phillips Episcopal Church Youth Group	Teen Sex-Superficial Image of Sex	1.25 hr	24
4/27/83	San Jose School Youth Group, Hereford, Tx	Teen Sex-Superficial Image of Sex	1 hr	35
5/8/83	St. Phillips Episcopal Church Youth Group	Teen Sex-Dec. Making	1.50 hr	10
5/16/83	Hilltop Learning Center Adult Group	Teenage Sexuality	2 hr	16
6/28/83	Amarillo? Adult Group	Teenage Sexuality	1.75 hr	10
7/16/83	St. Thomas Parents Group	Teenage Sexuality	2 hr	15
8/5/83	Texas State Foster Parent Assoc. Convention	Teenage Sexuality	1.50 hr	36
8/6/83	Texas State Foster Parent Assoc. Convention	Teenage Sexuality	1.50 hr	6
8/23/83	Parents Group/Support of Alcoholic Families	Teenage Sexuality	2 hr	8
9/6/83	Potter Co. Juvenile Probation – Adult	Teen Sex-Dec. Making/APCAPP	2 hr	7
9/15/83	Alamo Home/School Assc.	Teenage Sexuality/APCAPP	1 hr	98
		TOTAL – 43 PRESENTATIONS		1382 PERSONS

5. To develop and implement a marketing strategy utilizing public service announcements and to promote family guidance and support in making decisions concerning sexuality.

The objective was met through public service announcements and public presentations. See PSA and Public Speeches section for details.

[CARE REPORT]

1. To provide pregnancy counseling for 450 (75% = 338) adolescents requesting services. To provide assessment and an appropriate service plan for either preventative or maternity services as appropriate, and pregnancy testing for 120 (75% = 90).

	Amarillo	Lubbock	Total
Total Adolescents Requesting Service	99	107	253
Pregnancy Test	17	23	40

2. To provide service for 350 pregnant adolescents, including: pregnancy testing, counseling and caseworker services, group living, legal services, adoption, pre and post natal care, VD screening, homemaker services, child care arrangements, and family planning.

SERVICE	Amarillo	Lubbock	Total
Counseling/Caseworker	82	66	148
Pregnancy Test	8	18	26
Legal Services	22	3	25
Adoption Services	9	6	15
Pre/Post Natal Care	57	73	130
VD Screening	52	12	64
Homemaker Service	37	25	62
Child Care Arrangements	22	3	25
Family Planning	39	28	67

3. To provide group living and social services for 25 (75% = 19) pregnant adolescents by opening a maternity group home licensed for the care of adolescents.

	Amarillo	Lubbock	Total
Clients in Foster Care or Alternative Care	6	2	8

4. To place 60 (75% = 45) children born to adolescent mothers in adoptive homes.

	Amarillo	Lubbock	Total
Children Born to Adolescent Mothers	25	25	50
Placed in Adoption	9	6	15
Child with Mother	16	18	34
Other Arrangements	0	1	1

5. To provide "in-home" homemaker services, consumer education and educational/vocational counseling, as well as child care provider information/referral to 75 (75% = 56) adolescent mothers keeping their children.

SERVICE	Amarillo	Lubbock	Total
Homemaker Service	27	17	44
Consumer Education	6	0	6
Educational/Vocational	7	0	7
Child Care Provider Info/Referral	20	8	28

6. To provide fertility awareness information to 75 (75% = 56) adolescents.

7. To provide Family Planning Services to 150 (75% = 113) adolescents through the Natural Family Planning Program, or referral to other family planning programs.

SERVICE	Amarillo	Lubbock	Total
Fertility Awareness	64	41	105
Family Planning	39	28	67

Goal #3 Objectives

1. To provide assessment and an appropriate service plan for either preventative or pregnancy services to 450 adolescents requesting services. This will include 350 pregnant adolescents with services including: pregnancy testing (120); VD screening; pre and post natal care; counseling and casework services; group living; legal services; homemaker services; child care arrangements; adoption; and family planning.

   These services have been consistently provided to clients coming to CFS. We anticipate 400 adolescents will receive the service in the contract year. 350 pregnant adolescents will be served. The 100 additional clients projected to be served in '83-84 fiscal year will fall short by 50.

2. To design and implement a geographic outreach program to four communities as a method of increasing intake and extending services outside of the main urban areas.

   An outreach program to Snyder and Levelland is in place now. Outreach program development to Hereford and Dumas is in process and will be in place by the end of fiscal year 1984.

3. To provide alternative living and social services for 25 pregnant adolescents by opening a maternity group home licensed for the care of adolescents and by foster care.

   The maternity residence was licensed February 15, 1984 and to date had 9 pregnant adolescents cared for there. In addition 4 foster homes are currently licensed for the care of adolescents. 12 adolescents have been provided residential care to date.

   4. To place 25 children born to adolescent mothers in adoptive homes.

Only 5 children born to adolescent mothers were placed in adoptive homes thus far this year. The cause of less placements than projected is uncertain; staff believes that support for the adoption decisions by peers, families, and cultures is almost nonexistent.

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EXCERPTS FROM THE PROGRESS REPORT OF THE PIMA ASSOCIATED SERVICES FOR ADOLESCENT FAMILY EDUCATION PROJECT (PASAFE)

* * * * *

PASAFE Structure

The Pima Associated Services for Adolescent Family Education Project (PASAFE) is a collaborative entity formed of public and non-profit agencies to develop and implement a comprehensive, integrated delivery system of care and prevention services to adolescents living in Pima County. The Tucson Unified School District Number One (TUSD) acts as an anchor agency for this network of local agencies insuring that services are in place and delivered. Under contractural letters of agreement, seven metropolitan based organizations conduct linked delivery of services in a comprehensive program of health, social service and educational components.

Health agencies include Pascua Yaqui Tribe Health Department, St. Elizabeth of Hungary Clinic and the El Rio Santa Cruz Health Center. Special consultative and referral relationships are maintained with the University of Arizona Health Sciences Center especially the High Risk Unit, Pediatrics and Obstetrics. Kino Community Hospital, the county hospital, is utilized along with Pima County Health Department Clinic, by PASAFE agencies. Participating family social service agencies include Catholic Social Service, Jewish Family Service and Arizona Children's Home. Map of catchment area follows. The Teenage Parent Program of TUSD is an alternative school for pregnant and parenting youth, which also provides prevention services.

Each PASAFE agency functions within stated dimensions of objectives and activities under contractual agreements with TUSD. Each agency documents service

performance and maintains an individual audit system for documentation of expenditures and in-kind matching funds. Program management and monitoring is carried out by TUSD program coordinator.

* * * * *

PREVENTION PROGRAM

The PASAFE prevention component involves five of the seven PASAFE agencies: Teenage Parent Program, Jewish Family Service, Arizona Children's Home, Pascua Yaqui Health Department, and El Rio Neighborhood Health Center.

Goal: to prevent teen pregnancy and promote postponement of premature sexual activity.

Objective 1: to increase communication skills within the family and peer groups.
2: to increase self esteem including assertiveness.
3: to increase skills in decision making.
4: to increase skills in clarifying values within the family and peer group.
5: to increase knowledge of adolescent growth and development, human reproduction, and sexuality within the family.
6: to increase awareness of family planning services to adolescents and their parents.

PASAFE has developed a planned program which all five agencies implement in an effort to meet the above goal and objectives. Additionally, some individual agencies have other activities which address the objectives.

The PASAFE-wide plan has three components:

1. parent workshop
2. professional in-service
3. class series for children

This program is offered to community groups and elementary/middle schools. The target audience is children in 4th, 5th, and 6th grades, their parents, and those adults (teachers, nurses, principals, Scout leaders, and others) who work with children. All three groups must be involved in order to receive the service. This is required because of the belief that we cannot affect change in behavior and meet our objectives unless we work with parents, children, and other important adults in their lives. School nurses, principals, and central administrators have been made aware of this program. Currently, PTA's and School Community Partnership groups are receiving information. The Teenage Parent Program serves as the contact and scheduling agent for Tucson Unified School District. Other PASAFE agencies are making outreach to surrounding school districts and community youth serving associations and agencies. All five agencies work together to present the series.

The content of the presentations stresses development of skills and attitudes which foster shared communication within the family. "Talking about Sex with Kids" is a parent workshop designed by the Arizona Department of Health.

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Also, the consistency in delivering services with a common goal shared by all PASAFE agencies, has had a positive impact on our clients, i.e. self-esteem, potential in growth in the areas of education, parenting, relationships and personal growth.

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St. Elizabeth of Hungary Clinic

The on-going pre-natal program of St. Elizabeth Clinic consists of 3 components:

1. Health care-pre-natal, lab tests, nutrition, post-partum
2. Counseling – includes supportive role in planning for the future
3. Education – pre-natal, post-partum and parenting.

These are available singly or collectively dependent upon individual needs and circumstances. The program is geared to fit the person, not the person to fit the program. Unique to the PASAFE personnel is the referral, networking, and sharing of clients as the norm not the exception. Some TAP students receive health care here, some ACCESS (Arizona Medicaid) patients receive the educational phase here, and adoption counseling is referred to Catholic Social Service.

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EXCERPT FROM THE 1982 APPLICATION OF SEMO ASSOCIATION OF PUBLIC HEALTH ADMINISTRATORS, INC.

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III. *PROGRAM OBJECTIVES*—Results and Benefits Expected

A. *Results*

The goal of this project is to demonstrate effective and acceptable strategies for preventing early and inappropriate adolescent sexual activity and teenage pregnancy in a highly conservative and religious rural area. The applicant's Board of Directors and management team share the conviction that the attainment of this goal is only possible with the full support and guidance of the community's most important social institutions—the family, the church and the school, with the family being the most important and critical to its success.

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EXCERPTS FROM THE 1984 PROGRESS REPORT OF SEMO ASSOCIATION OF PUBLIC HEALTH ADMINISTRATORS INC.

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I. *SUMMARY OF THE PROJECT*

The Bootheel Adolescent Family Life Project is a regional effort on the part of SeMo Association of Public Health Administrators, Inc. in coordination with the Office of Adolescent Pregnancy in Washington to reduce the incidence of teen pregnancy and early sexual activity and to encourage pregnant teens to consider the option of adoption. The Project is broken into three distinct segments which are interrelated and supportive.

The first segment is sexuality education for parents. The Project provides a six hour parent education workshop for small groups of parents at a cost of $10 per person, $15 per couple. The workshop utilizes a curriculum workbook which can be used by parents in a continuing process of family life education. The goal of the parent education workshop is to provide basic education on sexuality training, to educate parents as to the availability of educational resources and to motivate the parents to become the primary sexuality educators of their children.

The second segment of the program is intensive nursing follow-up as a tool in reducing the incidence of secondary pregnancies to young women who become pregnant for the first time at age 17 or younger. The focus of this strategy is to build self-esteem and sexual knowledge among teens who get pregnant early in an effort to reduce the likelihood that they will inadvertently become involved in a second pregnancy. This is accomplished through a process of regular nursing follow-up by a project

staff member along with intensified efforts through a network of community volunteers who work with girls particpating in the program.

The third segment of the program is adoption counseling. The applicant provides adoption counseling to the participants in the nursing follow-up program upon their entry into the program. Those participants who indicate an interest in adoption are referred to a qualified Division of Family Services adoption counselor who will provide more intensive adoption counseling. With less than 5% of pregnant teens choosing adoption on a national basis, the project is attempting to determine whether the regular availability of adoption counseling will, in fact, increase the number of adoptions among the target population.

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III. *PROGRAM OBJECTIVES AND PROGRESS*

Objective 1: To demonstrate the effectiveness of a family/church based approached to position self-image and sexuality training for adolescents as a means of preventing early sexual activity and teenage pregnancy.

Progress: Since the achievement of this objective involves long-term pregnancy outcome, the success or failure of the project in meeting this objective will not be known for some years. However, there are interim measures that indicate that the parent education program is being accepted, and that the strategies advocated in the curriculum are being adopted by participant parents.. Evidence of acceptability continues to be reflected in the wide range of community groups that are sponsoring and participating in parent education workshops. To date, 2,761 people in the target area have participated in informational presentations, and over 200 parents have paid for participation in the six hour parent education workshop. Over 25% of the participating groups are sponsored by various religious organizations in the area. The religious organizations normally considered to be opponents of sexuality education are those organizations most firmly supportive of this particular curriculum. Widespread support of the workshop is considered to be a result of the fact that the workshop leaders do not express or promote their individual values in the group setting and that the primary focus is to assist parents in becoming the sexuality educators of their children.

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EXCERPT FROM THE CURRICULUM OF THE TEEN PARENT CENTER OF THE LOUISIANA DEPARTMENT OF HEALTH AND HUMAN RESOURCES

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XII. METHODS TO PROMOTE ADOPTION, FAMILY INVOLVEMENT, AND POSTPONEMENT OF PREMARITAL SEXUAL ACTIVITY

Adoption is promoted primarily in individual counseling sessions. During the initial interview session, adoption is presented as an option for the pregnant adolescent and teenage parent. In addition, information prepared by one of the Center's linkage agencies and Baton Rouge's only licensed adoption agency, Catholic Social Services, is given to the client.

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SEMO

PARENT SEXUALITY EDUCATION WORKSHOP

Revised Curriculum

December 1983

This curriculum is for a 6 hour intensive learning and motivational experience for parents. It is designed to assist parents in developing open and honest relationships with their children. Emphasis is placed on factual sexuality education, responsibility and self-esteem building.

Premise: The child who has an open and honest relationship with parent or parents, factual sexuality knowledge and high self-esteem is less likely to be involved in a teen pregnancy, tends to delay sexual activity and tends to adopt parental sexual values.

Goals: 1. To convince parents to become the primary sexuality educators of their children.

2. To promote the 4 point strategy for children's sexuality education.

3. To provide educational resources.

4. To provide examples of the effective strategies for teaching responsibility and self-esteem.

5. To negotiate family contracts or educational plans that are measurable and realistic with built-in 6 month evaluations.

ORGANIZATIONAL FACTORS AFFECTING WORKSHOP SUCCESS:

1. Time factors. The workshop curriculum is divided into three distinct sessions. These sessions are best presented on separate nights, one week apart, which will allow time for the participants to reflect on the material presented and to complete homework assignments in preparation for the succeeding sessions. Workshop leaders should start and end the workshop sessions in a timely fashion, allowing individuals who have questions to remain behind for explanations.

2. Setting. The setting for the workshop sessions should provide privacy and freedom from noise. The setting should be informal, preferably with a circle arrangement. The leaders should not stand, but should sit with the participants to dramatize the point that workshop leaders are parents as are the participants, and that everyone present is involved in an exercise in improving our mutual effectiveness in helping our children feel better about their sexuality and to take the responsibility for their sexual functioning.

3. Group size. Workshops are designed for no less than 10 participants and no more than 20 participants. It is to be an intimate, informal experience in learning and sharing.

4. Group composition. Participation in the workshop is not limited. The leaders do encourage that both parents participate when possible. Participation by males is strongly recommended, since the double standard is such a strong factor in sexual functioning of youth in this society. Participation by both parents serves to enhance sexuality education in the home. Our program recognizes this and hopes to increase total parent participation by offering a reduced rate for couples.

5. Participation of adolescents. It is not recommended that adolescents participate in Sessions I and II. The purpose of the workshop is to motivate parents. The participation of adolescents would tend to defeat our goal of encouraging parents to become the primary sex educators of their children. If parents wish to involve their children in the third and final session of the workshop, that is acceptable.

6. Target population. Since the goal of the workshop is to prevent inappropriate teen pregnancy, it is obvious that the primary target population is parents of very young children, since open and honest relationships on such taboo subjects as sexuality is most easily developed when the child is very young. The workshop is also quite relevant to parents of adolescents and sexually active teenagers, because it offers the opportunity to share experiences and to discuss techniques and strategies for teaching young people responsibility and facts about sexuality. Adults of all ages can benefit from participation in the workshop since adults of a variety of ages can have significant impact on the sexuality education of youngsters with whom they come in contact.

7. Materials and equipment required. Audio-visual equipment should include, at a minimum, an overhead projector, a 16 mm sound projector and a blackboard and chalk. The workshop handbook, pencils and educational resources are also a necessity. The workshop leader is encouraged to have all these materials organized and prepared well in advance of the opening of the first session.

8. Registration. It is important that registration activities be completed prior to the opening of the first session. All participants should be registered in advance and receive their workshop packets.

9. Cost. Cost of the workshop is $10.00 per participant and $15.00 for couples. The reason for this charge is twofold. a) Individuals who make a financial commitment in advance are more likely to complete the workshop. b) By making a token payment, which only pays a share of the cost for the workshop, the individual is acknowledging that there is value in participating. This is a very important psychological aspect of the workshop and should not be overlooked in generating effective compliance with workshop goals and guidelines.

SEXUALITY EDUCATION: THE PARENT'S RESPONSIBILITY
SESSION I – WHY TEACH SEX EDUCATION?

I. Introduction

A. Statement of Purpose: As Session I of the workshop opens, one of the two leaders will introduce him/herself and immediately give to the participants the following statement of purpose:

"We are here tonight to help each other to become better sexuality educators for our children. Our children learn about sex from a variety of sources; friends, literature, school and from some places we'd rather they didn't receive sexual information. Unfortunately, we as parents have not aggressively worked to become the primary sex educators of our children. We have a set pattern of allowing our children to learn about sex from other people and at the same time learn other people's values and ethics as they relate to sexual function. We firmly believe that families who talk openly and honestly with their children about sexuality and teach them responsibility and values have a better opportunity for helping their children to make good decisions – responsible decisions about sexuality. Preliminary research shows that in such families, children tend to adopt their parents' sexual values. They tend not to be involved in teen pregnancy and, perhaps most importantly, they tend to delay their first sexual activity. These are goals that all of us want for our children. In this workshop, we will be learning about techniques and strategies that can help us to achieve these goals with our children. After all, if our children can talk to us openly and honestly about questions that relate to sexuality, then there is no subject that we cannot learn to talk about with them.

Our capacity to help them solve their problems in growing up is increased in this way. No subject is taboo in this workshop. Anything you want to ask we'll be happy to talk about, openly and honestly. We don't have all the answers . . . we're not experts . . . but we do have access to resources, and together we will find the answers. Let's begin by completing an exercise that will help us know more about what you would like to get from this workshop."

B. Pre & Post Test: At this time the attached pre & post test is distributed to all participants. They are instructed to complete the form by indicating their identification number which is included with their workshop packet. They are to indicate where the workshop is located, the date and their sex and age. The first form on the pre & post is a collection of sociodemographic data such as: the occupation of parents, the yearly household income, the educational level attained, the number and ages of children and the participants race. The material collected on this form is utilized by the project researchers to develop baseline data about participants in the workshop so this data may be compared with the outcome of the other evaluation tools over the term of the project. The second page of the pre & post test is made up of a subjective evaluation of the participant's comfort level with the thirteen topical areas to be covered during the workshop on human sexuality. This form will be completed again at the end of the workshop in order to indicate the participant's view of how the workshop has helped him to feel more comfortable with the subject matter. The third page of the pre & post test is the 10 True & False questions designed to measure objectively

the participant's knowledge base on human sexuality prior to the workshop and at the completion of the workshop. The participants should be advised that this material will not be reviewed by the workshop leaders but is being used for national research in the effort to reduce teen pregnancy.

II. Icebreaker

It is recommended that the following icebreaker be used at the beginning of the first session. It has proven effective in setting the mood for an appropriate learning experience.

One of the leaders should tell the participants the following:

"Before we get started, maybe it's important that we learn a little about each other. Let's begin by sharing our name and three nice things about ourselves. I'll begin."

The last person to participate in this icebreaker should be the other workshop leader, with the purpose being to create, by his or her statement of three nice things, vulnerability to make the point that in this workshop it is O.K. to share personal experiences and be vulnerable with parents on the subject of sexuality. This exercise can be utilized by the leaders to identify persons in the workshop who are most likely to actively participate and those who have low self-esteem and need to be drawn into the discussions with small successes.

III. Why Teach Sex Education?

A. *Teen Sexuality Test* (10 minutes to take test, 45 minutes total with discussion.)

The Teen Sexuality Test has been developed as an educational tool to assist parents in understanding the severity of the problem of teen pregnancy in America and Southeast Missouri.

The purpose of giving this test is to convince the parents that teen pregnancy is a local problem that is not limited to low income people or people of different ethnic background. At the end of the test discussion, all the participants should be motivated to learn more about how to prevent inappropriate teen pregnancy. The copy of the test is provided as an attachment. After the test is completed, the leaders take turns in leading a discussion on the answers to each of the questions.

B. *Everyone is a Sex Educator*

This exercise, which is attached, is designed to convince participants that regardless of our attitudes toward sexuality education, we are all acting as sex educators in our lives. It is not a question of whether we will teach sex education to our children, but whether we will do it effectively and with some conscious effort in order to make sure the educational experience is a positive one, based on facts and with good self-esteem. During the exercise, the participants are broken up into small groups who discuss the various examples. They choose a leader to report to the larger groups just what they feel the impact of this particular example might have been on the child involved. Invariably, participants will bring up similar examples from their own experience. This is to be encouraged, since it initiates the process of group resolution of problems associated with sexuality education in the home.

BREAK –

At this time a 10 minute break is declared. Leaders encourage participants to use this break to examine some of the resource materials and booklets which are on display at the workshop.

IV. Why Parents Avoid Sexuality Education

A. Sexuality Communication Questionaire

This short questionaire is given to the participants with instructions that they complete it in the privacy of their own home with their spouse prior to the second session of the workshop. The purpose of this form is to help parents recall their own experience as adolescents in finding out about sexuality. We want them to be able to have a better understanding of what children go through in a sexual society that is not open to honest discussion about sexual questions. By understanding their own negative experience on sexuality education they will be better able to relate to the material in Session II which provides detailed information about sexual functioning and information.

B. Barriers to Communication

Barriers to communication are most often categorized as inexperience, embarrassment, and misconceptions associated with the transfer of sexuality information. The leaders will direct the group's discussion toward an examination of each of these excuses for not giving sexuality information. The leaders will point out that all of us were inexperienced with regard to sexuality education because few of us had parents who provided a role model for distribution of sexual information. Embarrassment is addressed through a discussion of the fact that it is not necessary for the parent to be comfortable with the subject. In fact, it may improve the quality of conversation with the youngster for the child to know talking about this subject is difficult for the parent, but because the parent feels love and concern for the child, it is a subject they must

discuss openly and honestly. Misconceptions with regard to sexuality education include such factors as the parent's belief that they must be an expert or the fear they can tell a child too much and cause the child to begin experimenting with sexual activity. Other parents feel that you should wait until the child asks. This section of the workshop is designed to allow the participants to reach the conclusion that there are no excuses that are valid when it comes to sexuality education. Children learn about sexuality in our society, but most often they learn misinformation or incomplete information and too often they receive that information from people who don't share their parent's moral or ethical values about sexual functioning. The leaders should emphasize regardless of how difficult it is, it's the parent responsibility to be the role model for children's sexual education.

V. 4 Point Strategy to Effective Communication

The Parent Sexuality Education Workshop is based upon this 4 Point Strategy. The 4 Point Strategy of teaching children facts, values, expectations and responsibilities and self-esteem. This portion of the workshop should be a discussion with the participants following this basic presentation on the 4 Point Strategy. We believe that parents who talk to their children openly and honestly about sexuality, tell them the truth and who tell them what they believe and what they stand for are more likely to have children who adopt their parent's values, who delay their sexual activities and who tend not to be involved in teenage pregnancy.

We've broken this strategy down into four simple components. We'll discuss each of them briefly.

1. FACTS: We believe that children deserve to have the facts in answer to their questions about sexuality. In this society we tend to go out of our way to keep from giving children information about sexuality, in spite of the fact that peer pressure, literature, media and other people in our communities are actively involved in transferring a variety of sexual information to children every day. Much of that information is incorrect, much of it is only partially correct. If children are to make good decisions as adults about things such as refrigerators or cars, they need to have the best available information and advice about how to comparison shop, how to look into consideration of options and performance. In other words, we want our children to make economic decisions that are wise and just and responsible. But in the sexual arena, we go out of our way not to give children information and yet, the decisions they make about their sexual functioning are more important than the economic decisions and they, too, need to be based on honesty, wisdom, justice and responsibility. If our children are to make such decisions, they need to have the facts; even when the facts are not pleasing to us as parents. Throughout the workshop we will insist that children deserve to have facts in answer to their questions. This practice will keep them coming to their parents as a source of knowledge in all areas of their lives.

2. VALUES: Many decisions about human sexual functioning require more than facts if we're to make the right decision because sexuality often involves ethics, morality and integrity. These are values and children have to learn values. If we want our children to make good decisions, then

we need to give them facts, but we also need to let them know about a set of values that we believe in and that we know will help our children make good decisions that are rewarding and responsible. The schools and other institutions in the community can effectively transfer knowledge, but it's very difficult for them to transfer values. Parents, on the other hand, have the primary responsibility for teaching values to children. This second component of the 4-Point Strategy is to make sure that children get not only the facts, but how parents believe the facts should be applied and what they stand for, believe in and value regarding sexuality.

3. EXPECTATIONS AND RESPONSIBILITIES: Children should learn early that in the sexual arena, just as in any other facet of their lives, they have to be responsible. They should know that anything they do will have consequences and that they are responsible for the actions. In America, 85% of the boys who get girls pregnant, eventually abandon the girl. That is a reflection of a lack of responsibility. It means that young men are not willing and are not trying to make decisions in advance about the consequences of their actions and then make responsible decisions relative to those actions. If we expect our young people to exhibit this kind of responsibility, we must tell them, in no uncertain terms, what we expect of them and what their responsibilities are. From a very early age, we must insist they pay the consequences for their actions and accept responsibility for what they do.

4. SELF-ESTEEM: There seem to be two common characteristics of children who get pregnant

early. They are limited sexual knowledge and low self-esteem. Logically, if we can help children to feel better about themselves and their bodies and help them to set realistic life goals, they will be less likely to jeopardize their own goals and their own respect for themselves and their bodies by being involved inappropriately in teen pregnancy. The second fact of self-esteem development deals with the fact that in our society, sex is considered dirty or bad. Quite to the contrary, sex is a beautiful and important part of the human experience. It is only the way we look at sexuality that makes it dirty. As parents, we must help our children to have a positive attitude toward themselves and their bodies. They must have a positive attitude toward individuals of the opposite sex. Young people who learn about sex in an environment that is positive are more likely to pride themselves on that aspect of their experience and be responsible in how they use their sexuality.

At this time the leaders will tell the participants:

"This, then, is our 4-Point Strategy. Throughout this workshop, we will be discussing techniques and strategies for teaching children about sexuality by using this plan. Whatever the question their child might ask, we feel that it can be most effectively answered by making sure that, first of all, we answer it honestly and completely. We must be sure to let the child know how we feel about it. We must let the child know what our expectations are and what his responsibilities are. Finally, we must give all this information in a way that makes the child feel good about himself. Now that you know our 4 Point Strategy, do you have some ideas about how we can begin to talk about using this strategy to answer some of the questions that your children have asked that you found difficult to answer?" The participants should be advised that later in the

workshop, we will be asking them to give examples of how difficult questions about sexuality could be dealt with according to this 4-point strategy. At this point, the leaders will hand out a list of questions by 5th and 6th graders from the local community regarding sexuality. The participants are requested to take this list of questions home and examine in their own minds how they would have answered those questions using the 4-point strategy, had it been their own child asking the question.

IV. Outline of next two sessions

The leaders will hand out the curriculum outline for the next sessions which includes the 13 sexual topics about which every child should know. Most of the questions parents have about teaching children sexuality are covered within this 13 topic area. By handing this form out at the end of the first sessions, it helps the participants know that their own concerns are going to be dealt with in some detail in the second session. They are encouraged to develop in their own minds a list of questions they would most like to have answered for presentation at the second session.

SEXUALITY EDUCATION: THE PARENT'S RESPONSIBILITY
SESSION II – COMMUNICATION SEXUALITY

I. Introduction

A. Statement of Purpose: As Session II of the workshop opens, one of the leaders will give the following statement of purpose:

"The purpose of tonight's discussion is to provide basic facts that children need to know about sexuality, to explore myths, and to stress the proper terminology that should be used with children about sexuality and to provide a variety of educational resources that can be used by the parent in the home. During tonight's session we will be discussing sexuality in a variety of areas and we will be using the proper names for sexual body parts and functioning. You are encouraged to ask any questions about any of these topics which you feel are appropriate. Those we cannot answer we will assist you in finding the answers to.

II. Warm-up exercises

The warm-up exercises here are designed to set the mood for an intimate discussion of sexual functioning in a wholesome and appropriate atmosphere to make the point, by example, that the family can discuss sexuality as a family unit with dignity and in a wholesome nature without embarrassment, just as they would discuss any other subject.

A. When should Sex Education begin?

1. Role play of toddler questions: At this time the leaders will lead a discussion by demonstrating typical questions asked by very young children about sexuality and humorous ways we parents often answer, or fail to answer, these

questions. The purpose of this role playing discussion is to help parents feel comfortable with the idea of talking about sex in general.

B. How to handle 4-letter words

During this brief discussion the leaders will demonstrate effective ways to deal with young children and their use of 4 letter words. The technique to be utilized is to simply repeat the word and ask the child if they know what it means. Then tell the child what the word means and they, as parents, do not approve of that word. Parents should then give them other words they may use as substitutes. In this example the leaders are careful not to present the information in an accusatory way but rather to use the 4 point strategy in conveying methods by which to handle these situations.

III. Talking to Teens About Sex
(Handout for discussion)

This exercise is designed to provide parents with some guidelines that will help them in beginning a conversation with children about sexuality. It helps them to better understand the indications that a child, especially teenagers, need information, about sexual subjects. The handout is for use and review at home following the second session.

IV. What every child should know about sex

The 13 topics included in this session are topics that every child should know about. When our nurses talk to young people in the schools they find that children of very young ages ask very explicit questions about the subject matter of this list. Invariably, they find it difficult to get information on the subjects from adults and, in particular, from parents. The purpose of our discussion of these topics is to go

over the kinds of information the children should receive and talk about some techniques for transferring that information.

The outline for each of the subjects is provided in the workshop packet but should be used by the participants as a reference guide since the workshop leaders will be covering the information in the packets as well as additional information under each of these topics. The leaders should encourage active participation in the discussion by participants. Invariably, this second night of the workshop involves a good deal of sharing of personal experiences by parents of adolescents on many of these subject areas. The leaders should be aware that participants may vary in their beliefs about sharing information about these topics, since many of the topics are controversial. Workshop leaders are not to share their values on any of these topics but to encourage parents to understand that their values are what are most important and are the values that should be shared with their children. If we find individuals who do not accept the facts outlined in the curriculum, we tell them simply that children have to live in a real world. If we give them only the facts that we like, our children will find out soon enough that their parents did not deal with them honestly on these subjects. We feel that it is much better to share the facts, even if you don't agree. Then you can tell the child that you do not agree with the facts or that your values do not support those facts.

Participants should be encouraged to give examples of how they would discuss these topics using the 4 Point Strategy.

SEXUALITY EDUCATION:
THE PARENT'S RESPONSIBILITY

SESSION III – BUILDING SELF-ESTEEM

I. Introduction

A. Statement of Purpose: As Session III of the workshop begins one of the workshop leaders will make the following statement of purpose:

"The purpose of tonight's session is to help parents provide sexuality education in ways that build self-esteem."

II. Film and Discussion

A. Film: 'A Family Talks About Sex'
Produced by Wexler Films
Distributed by Perennial Education, Inc.
477 Roger Williams
P.O. Box 855 Ravinia
Highland Park, IL 60035

'A Family Talks About Sex' offers a variety of responses to sexuality education. It gives examples of how families like you and I might respond to the young person's questions about sexual issues. But more importantly it helps us see parents transferring sexuality information in a way that helps children feel good about themselves and their bodies, in a way that teaches them responsibility. If you watch carefully, you will see the parents depicted in this film transferring information to their children in accordance with the 4-point strategy. In almost every instance they talk about the facts, their values, what their responsibility to the child is and this is all done in a way that helps the child feel good about him/herself. Adequate time for discussion of the techniques depicted in the film and the self-esteem development should be allowed following the film.

III. Participant questions: Applying the 4-point strategy

At this time, immediately after the discussion of the film, it is appropriate to ask the participants to contribute questions anonymously that they would most like to have answered about sexuality. The workshop leaders will then lead a discussion of how these questions might best be answered, using the 4-point strategy. Gradually, the participants will be pulled into this example of using the strategy.

IV. Post Test

During this period, the participants will once again take the 10 questions True & False test and, once again, they will complete the subjective evaluation of their comfort level with regard to the 13 topical areas of Session II. These will be completed and submitted for review by the project research team.

V. Defining goals and action steps

At this point, the workshop leader should explain just exactly what is expected of the participants.

In the workshop we attempt to motivate people to become the primary sexuality educators of their children. We ask them to give consideration to the use of a 4-point strategy which combines facts with values, responsibility and self-esteem. All of these things, of course, are aimed at improving children's sexual knowledge and improving their self-esteem as tools to assist them in delaying sexual activity and preventing inappropriate teen pregnancy. If we are to be successful, we must ask the participants to aggressively adopt a plan of action or make a contract with themselves to outline, in measurable terms, exactly how they are going to use the knowledge gained in the workshop to improve communication and education with their own children. At this point the

forms are handed out and the participants are asked to complete what they plan to do about sexuality education in their own family, state when they will begin and to outline their specific goals for sexual communication within the family over the next 6 months. This is a two part form. One part is kept by the participant, and the other copy is returned to the workshop leader. Participants are advised that the leaders will contact them after 6 months to find out how well they did in achieving their goals. The leaders also offer additional resources or assistance throughout the 6 month period at the request of the participant. If the appropriate environment and relationships have been established, participants should, routinely, avail themselves of these resource materials during this 6 month trial period.

VI. Workshop evaluation

At the conclusion of Session III the workshop evaluation forms are given to the participants for completion.

This concludes the Parent Sexuality Education Workshop.

DEPARTMENT OF HEALTH & HUMAN SERVICES

Public Health Service
Office of the Assistant Secretary for Health
Washington DC 20201

Ms. Elizabeth West
Catholic Charities of Arlington
3838 N. Cathedral Lane
Arlington, Virginia 22203

Dear Ms. West:

I regret that I am unable to approve your request for continued support from the Office of Adolescent Pregnancy Programs.

As you will note, among the grant conditions you agreed to for the period from October 1, 1984 to September 30, 1985, is a condition which provides, "The program shall be designed so as to be, to the extent possible, accessible to the public generally." It has been the consistent position of this Office, from the inception of the Title XX program, that grantees, irrespective of their religious affiliation, are obliged to design and operate their projects so as to the greatest extent practicable involve the community generally. It was to clarify this position that the above referred to grant condition was added in 1984. As you know, our Office has, for some time now, been dissatisfied with the efforts you have been making toward that end.

Among other things, we have concluded that your attempts at contacting and involving community groups have been inadequate as have been your attempts to follow-up those contacts you did make. Furthermore, the structure and physical location of your programs have not been designed so as to attract outside community members. As a result your program has not been made

sufficiently available to a cross-section of the community to be served.

While we understand that you have begun some efforts in the past week to broaden the scope of your program, such efforts should have been made long ago.

Accordingly, as stated above, we are hereby disapproving your request for a continuation grant.

This decision is appealable under the Department Grant Appeals process as cited in 45 CFR Part 60. You will receive an award of $2,000 to assist you in the close-out of the AFL program.

Sincerely,

/s/ JO ANN GASPER
Jo Ann Gasper
Deputy Assistant Secretary
for Population Affairs

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 83-3175

CHAN KENDRICK, ET AL., PLAINTIFF,

v.

OTIS R. BOWEN, M.D.,
SECRETARY OF THE DEPARTMENT OF HEALTH AND HUMAN SERVICES, DEFENDANT,

AND

SAMMIE J. BRADLEY, ET AL., DEFENDANT-INTERVENORS.

DECLARATION OF JO ANN GASPER

Jo Ann Gasper declares and states as follows:

1. I am the Deputy Assistant Secretary for Population Affairs of the Department of Health and Human Services. I have the delegated authority for administering the program of demonstration grants authorized by Title XX of the Public Health Service Act, 42 U.S.C. 300z, *et seq*. By virtue of my position, I supervise the project officers and other staff who carry out the program's operations. I also have custody and control of the grant files under the program. The information below is provided in response to this Court's order dated May 8, 1987, and the Court's requests for information at the hearing of May 7, 1987.

2. Attached at Tab A is a list of past and present Title XX demonstration grantees, the amounts of Title XX funding awarded to each by fiscal year (FY) through FY 1986, and the number of clients served, by project, according to data supplied to our office by the grantees. Although the majority of present demonstration projects end at the end of this fiscal year, the projected funding for next year for those whose project periods continue beyond

September, 1987, is also set out.[1] The commencement of funding for each project is indicated by the earliest FY column in which a dollar amount appears; the conclusion of funding for those projects which have ended is indicated by "0" in a column.[2]

3. Attached at Tab B is a listing of the amount of FY 1986 funds which, according to our estimate, remain to be drawn down by the 23 grantees whose funds we have stopped pursuant to this Court's order of April 15. Also included is our estimate of the number of clients served by those projects who we estimate are affected by the stoppage of funds. In my view, the dollar amounts set out at Tab B seriously understate the economic impact of the Court's April 15th order. The timing of the order is such that grantees in their final year of funding will not be able to complete their statutorily mandated evaluations. Since Title XX is a demonstration program, the purpose of which is to gain knowledge about different approaches to dealing with the problems of teenage sexual activity and adolescent pregnancy and parenting, loss of the evaluations means that much of the benefit expected to arise from, in the usual case, five years of funding will be lost.

4. My office does not require grantees to report the information about subgrant and subcontract arrangements which the Court's May 8th order requires us to provide. Accordingly, I directed my staff to telephone each current and past Title XX demonstration grantee to ascertain their

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[1] See the column "Projected FY 87 Awards." Aside from these amounts, I am unable to provide a list of future grantees or the amounts of future grant awards, as the current grant award cycle is currently in process.

[2] Funding for all projects commences on October 1 of each year of funding; funding for each project that has terminated has generally ended as of September 30 of the first year in which a zero is shown. However, in a few cases, limited phase-out funding for a period of several months has been provided.

past, present and future subgrant and subcontract arrangements and the amount of such subgrants and subcontracts. Attached at Tab C is a summary of the information provided by the grantees to my staff by telephone. It should be noted that my staff was unable to contact all present grantees in the time available; I will supplement with the additional information as soon as I receive it. We also were unable to obtain the required information from most grantees whose grants have expired, either because they are no longer in existence or they were unwilling to provide the information.

5. All subgrantees are bound by the statute and the applicable regulations at 45 CFR Part 74 governing the administration of grants. In addition, a subgrantee is bound by other terms and conditions of the grant, to the extent such terms and conditions are not solely limited to the grantee's operations. A list of the standard terms and conditions applicable to demonstration grants for each fiscal year is attached at Tab D. (To the best of my knowledge, any project-specific conditions that have been attached to grants have not been applicable to subgrantees.) In addition, a copy of the Public Health Service Grants Policy Statement is attached at Tab E. Finally, following the Court order of April 15, my staff instructed grantees not to fund subgrantees who are religious organizations until further notice.

6. During the course of their telephone calls to grantees, my staff was informed by several grantees of their concerns regarding their ability to operate as a result of the Court's order of April 15. Since I consider their concerns to bear on our pending motions for stay and clarification, I asked that we obtain statements from those grantees (Southern Tier Office of Social Ministry, Elmira, New York; Young Families Program, Inc., Billings, Montana; and Catholic Family Service, Fargo, North Dakota). The statement from Catholic Family Service is attached at Tab

F. It is my understanding that statements from Southern Tier and the Young Families Program are en route to the Department, and I will supplement this declaration with those statements as soon as they are received.

I declare under penalty of perjury that the above statements are true and correct. Executed this 12th day of May, 1987 at Washington, D.C.

/s/ JO ANN GASPER

Jo Ann Gasper

AFL DEMONSTRATION PROJECTS FUNDED

Grant	Grantee	Funding FY 86	Funding FY 85	Funding FY 84	Funding FY 83	Funding FY 82	Total Funding	Projected FY 87 Awards	Clients Served 1985-86
CARE PROJECTS:									
101	Family Service Agency, CA	$214,745	$264,290	$337,025	$337,025	$337,025	$1,490,110	$0	1,274
102	Louisiana DHHS, (BatonRouge) LA	NOTE C	57,608	102,000	120,000	120,000	399,608	0	Note C
103	Visiting Nurses Assn. NH	49,217	64,285	77,143	90,000	90,000	370,645	0	200
104	Wayne County Sch. Dist. MI	76,560	100,000	120,000	140,000	140,000	576,560	0	630
105	St. Ann's Inf & Mat. MD	104,683	136,734	171,428	235,000	200,000	847,845	0	1,121
106	SUMA, OH	0	0	180,000	160,000	185,600	525,600	0	0
107	Parent/Child Dev Sys, GA	68,357	85,714	100,000	101,500		355,571	57,142	1,067
108	La Clinica de Familia, NM	109,429	85,106	125,000	125,000		444,535	86,640	120
109	Dept of PubHlth/Soc Sys, Guam	97,600	113,318	80,000	80,000		370,918	81,588	276
110	Father Flanagan's Boys-Home, NB	0	112,072	135,150	135,150		382,372	0	0
111	YWCA, OR	134,836	165,248	183,281	183,281		666,646	113,092	311
112	Young Families Prog, MT	64,849	62,414	62,414			189,677	49,938	98
113	Caguas Regional Hosp. PR	139,510	163,756	129,000			432,266	121,482	113
114	Exch. Club Parent/Child Ctr, MS	34,302	42,692	40,817			117,811	29,869	24
115	Sisters of Charity HlthSys, ME	176,231	214,840	145,000			536,071	153,458	360
116	Salvation Army Mat. Home, OK	20,734	136,430	145,744			302,908	0	6
117	Community Hlth Clinics, ID	149,321	156,030				305,351	133,740	156

Grant	Grantee	Funding FY 86	Funding FY 85	Funding FY 84	Funding FY 83	Funding FY 82	Total Funding	Projected FY 87 Awards	Clients Served 1985-86
CARE PROJECTS:									
118	Univ of Illinois (Urbana), IL	99,379	92,032				191,411	41,971	50
119	Our Lady Prov Children's Ctr, MA	210,965	209,523				420,488	188,952	247
120	Florence Crittenton H/Hosp, SC	168,606	172,593				341,199	75,101	139
121	Rhode Island Dept Human Svs, RI	143,550	150,000				293,550	128,572	120
122	LA State Off (Baton Rouge), LA	65,076	NOTE C				65,076	0	427
123	N. Counties Hlth Cntrs, VT	145,791					145,791	145,791	New Proj
124	Child Saving Institute, NE	112,729					112,729	112,729	200
125	Child/Family Sys Knox Co., TN	221,366					221,366	221,366	205
126	Catholic Char of Fargo, ND	224,747					224,747	224,747	New Proj
127	Panhandle Comm. Svs., NB	79,438					79,438	79,438	New Proj
702	St. Paul-Ramsey Med Ctr, MN	160,776	210,000	252,000	291,626	284,000	1,198,402	0	78
703	Cities in Schools, GA	288,145	340,000	408,000	473,540	380,000	1,889,685	0	951
706	Providence Amb. Hlth CareFdn, RI	100,294	131,000	144,000	138,000	138,000	651,294	0	444
710	Univ of Utah, UT	108,092	144,167	173,000	175,000	165,000	765,259	0	778

Grant	Grantee	Funding FY 86	Funding FY 85	Funding FY 84	Funding FY 83	Funding FY 82	Total Funding	Projected FY 87 Awards	Clients Served 1985-86
CARE PROJECTS:									
803	Manpower Demo Research, NY	0	180,000	136,023	236,000		552,023	0	0
806	Adoption Sys of WACAP, WA	266,592	291,250	325,000			882,842	232,143	486
807	Covenant House, NY	269,386	409,029	350,000			1,028,415	292,164	425
809	Univ of Texas Hlth Sci Ctr, TX	326,894	470,700	371,000			1,168,594	341,572	1,438
810	Bank St. College of Ed, NY	238,870	273,000	300,000			811,870	0	218
811	Catholic Charities USA, DC	302,204	315,783				617,987	270,671	450
813	Utah State Univ, UT	142,083	148,467				290,550	127,257	135
PREVENTION PROJECTS:									
301	Galludet College, DC	0	43,430	86,000	100,000	100,000	329,430	0	90
302	Mt. Vernon Public Sch, NY	95,869	116,486	98,000	100,000	100,000	510,355	0	4,686
303	Univ. of South Carolina, SC	50,707	66,961	67,224	25,000	50,000	259,892	0	6,600
304	Lutheran Family Services, IA	0	0	0	28,700	29,043	57,743	0	0
305	Cath. Char., Arlington, VA	0	0	64,286	75,000	75,000	214,286	0	0
306	Brigham Young Univ, UT	101,919	133,123	157,969	185,423	185,423	763,857	0	1,152
307	Cath Soc Sv of Wayne Co, MI	42,876	41,334	73,600	85,000	85,000	327,810	0	2,824
308	DHHR, (New Orleans), LA	20,290	62,260	65,712	66,664	82,000	296,926	0	3,620
309	Minnesota Institute, MN	0	94,429	111,394	120,000	120,000	445,823	0	343
310	Community Hlth Clinics, ID	0	0	41,745	3,000	95,000	139,745	0	0
311	County Adol. of Berkshire, MA	0	0	75,436	77,775	70,000	223,211	0	0

Grant	Grantee	Funding FY 86	Funding FY 85	Funding FY 84	Funding FY 83	Funding FY 82	Total Funding	Projected FY 87 Awards	Clients Served 1985-86
CARE PROJECTS:									
312	Emory Univ., GA	69,986	81,435	100,696	99,971		352,088	0	6,496
313	Medical Care Dev., ME	83,295	101,544	101,544			286,383	0	116
314	Margaret Hudson Prog., OK	54,894	66,920	66,920			188,734	47,800	44
315	Montana State Univ., MT	108,625	85,780	84,000			278,405	90,321	105
316	Guidance Center, PA NOTE A	55,001	71,987	76,000			202,988	0	498
317	Lutheran Fam. Sys. NW Indiana, IN	79,397	82,964				162,361	71,112	192
318	S Dakota Dept of Health, SD	94,303	98,540				192,843	84,463	600
319	YWCA Maricopa Co. AZ	73,474					73,474	73,474	New Proj
320	Gov. Off Fed/State Prog., MS	22,340					22,340	22,340	New Proj
321	N. Cen. Mental Hlth. Sv., OH	39,438					39,438	39,438	New Proj
322	Jackson State Univ, MS	57,542					57,542	57,542	New Proj
323	Milwaukee Comp Comm Hlth, WI	88,217					88,217	88,217	New Proj
705	SE Mo Assn of Pub Hlth Adm, MO	44,199	47,598	85,740	100,000	100,000	377,537	0	993
707	CEMP Counseling Sys Dept, PA	0	0	NOTE A	88,734	120,000	208,734	0	0
709	Univ of Arkansas, AR	0	0	0	0	55,000	55,000	0	0
801	Search Institute, MN	236,988	208,099	318,527	318,527		1,082,141	175,720	2,159

Grant	Grantee	Funding FY 86	Funding FY 85	Funding FY 84	Funding FY 83	Funding FY 82	Total Funding	Projected FY 87 Awards	Clients Served 1985-86
PREVENTION PROJECTS:									
802	COSSMHO, DC	281,888	353,464	395,985	395,985		1,427,322	235,643	490
804	Family of the Americas, LA	239,250	300,000	350,000	350,000		1,239,250	0	2,075
805	National Urban League, NY	97,205	193,574	201,785			492,564	0	100
808	Southern Tier Off. Soc. Min., NY	164,989	275,000	275,000			714,989	196,429	564
812	Amer Assoc Counsel/ Devel, VA	152,428	100,432				252,860	140,076	4,000
814	American Red Cross, DC	164,437	174,960				339,397	149,966	1,890
815	Boys Clubs of America, NY	155,112	162,081				317,193	138,936	125
816	Comm. on Status of Women, IL	132,510	101,901				234,411	87,344	754
COMBINATION PROJECTS:									
501	Greene Cty Hlth Care, NC	103,901	135,715	145,000	190,000	190,000	764,616	0	1,539
502	Family Hospital, WI	139,722	182,501	219,000	208,305	255,000	1,004,528	0	977
503	Lexington-Fayette CHD, KY	99,528	130,000	150,000	145,000	125,000	649,528	0	277
504	Hull House Assn, IL	143,965	180,543	190,000	186,466	225,000	925,974	0	173
505	Economic Opportunity, FL	80,746	38,146	72,857	85,000	85,000	361,749	0	395
506	Tacoma-Pierce Cty HD, WA	124,940	111,172	186,000	217,000	205,000	844,112	0	926
507	State of Hawaii, HA	107,271	96,900	129,000	60,000	200,000	593,171	0	737

Grant	Grantee	Funding FY 86	Funding FY 85	Funding FY 84	Funding FY 83	Funding FY 82	Total Funding	Projected FY 87 Awards	Clients Served 1985-86
COMBINATION PROJECTS:									
508	E. Conn Par/Child Res, CN	71,567	100,629	175,424	195,000	195,000	737,620	0	773
509	YWCA of St. Petersburg, FL	51,678	67,500	69,000	70,000	70,000	328,178	0	592
510	City of Gary-Emerg Ref Sv, IN	54,297	12,833	85,105	99,289	100,000	351,524	0	131
511	Tucson Unified Sch Dist, AZ	132,660	160,370	207,929	225,000	225,000	950,959	0	5,336
512	Maternal & Family Hlth Sys, PA	87,661	114,500	129,000	150,000	150,000	631,161	0	617
513	Douglas Cherokee Econ Auth, TN	151,980	131,406	257,143	300,000	361,000	1,201,529	0	3,996
514	Catholic Fam Sys (Amarillo), TX	104,672	203,875	214,000	250,000	250,957	1,023,504	0	4,400
515	Hill Health, CN	124,608	20,000	131,527	139,938	165,000	581,073	0	32
516	Child Opportunity Prog, CD	100,863	184,286	221,143	273,000	258,000	1,037,292	0	4,563
517	Lyon County HD, KS	32,984	60,603	71,000	82,000	82,000	328,587	0	271
518	Discovery Room for Children, NY	0	0	0	100,000	175,000	275,000	0	0
519	St. Mary Hlth Dev Ctr, SC	137,170	161,904	215,000	250,000	300,000	1,064,074	0	584
520	Norfolk State Univ, VA	89,343	91,478	155,000	165,000	150,000	650,821	0	704
521	Addison Co P/C Ctr, VT	109,098	142,500	171,000	140,718	140,718	704,034	0	421
522	Camden Co Dept of Hlth, NH	205,451	290,531	360,000	420,000	420,000	1,695,982	0	12,813
701	C. Henderson Child Hlth Ctr, AL	173,502	226,622	271,947	287,000	298,000	1,257,071	0	1,166
704	Memorial General Hosp, WV	0	171,300	219,000	255,000	215,000	860,300	0	0

Grant	Grantee	Funding FY 86	Funding FY 85	Funding FY 84	Funding FY 83	Funding FY 82	Total Funding	Projected FY 87 Awards	Clients Served 1985-86
COMBINATION PROJECTS:									
708	St. Mary's Hospital, MD	0	0	144,097	155,000	180,000	479,097	0	0
711	St. Margaret's Hospital, MA	223,952	292,519	402,000	466,000	494,647	1,879,118	0	3,213
712	Youth Health Sys, WV (NOTE B)	139,722	17,200				156,922	0	2,687
	Total Demo Regular Awards	$10,640,826	$11,734,557	$12,061,263	$10,251,106	$8,756,868	$53,444,620	$5,008,244	100,346
	Supplemental Awards	72,991	152,859	20,497	104,511	64,545	415,403	0	
	Total for Fiscal Year	$10,713,817	$11,887,416	$12,081,760	$10,355,617	$8,821,413	$53,860,023	$5,008,244	

NOTES:

A-CEMP (#707) trans. to Guidance Ctr (#316)
B-MemGenHosp (#704) transferred $17,200 to Youth Hlth Sys (#713)
C-LA DHHS (#102) trans to LA State Off. (#122)

Television audience potential of 952,000

ADOLESCENT FAMILY LIFE PROGRAM

	Project Type	Initial Funding Year	Project Period	(FY 86) Funding Year	FY 86 Award	Amount Available 4/22/87		Clients Served *	Est. '87 Awards
PROJECTS CITED:									
St. Ann's Inf & Mat, MD	Care	82	5	5	$ 104,683	$ 53,342		1,121	0
SUMA, OH	Care	82	3	0	0	0		0	0
Lutheran Family Sys, IA	Prev.	82	2	0	0	0		0	0
Catholic Char., VA	Prev.	82	2	0	0	0		0	0
Cath Soc Ser Wayne Co, MI	Prev.	82	5	5	42,876	27,391		2,824	0
DHHR (New Orleans) LA	Prev.	82	5	5	20,290	36,637	NOTE	3,620	0
Search Inst., MN	Prev.	83	5	4	236,988	125,441		2,159	$175,720
Family of Americas, LA	Prev.	83	4	4	239,250	50,550		2,075	0
State of Hawaii, HA	Comb C/P	82	5	5	107,271	86,666		737	0
Cath Fam Sys (Amarillo) TX	Comb C/P	82	5	5	104,672	123,991	NOTE	4,400	0
Lyon Co HD, KS	Comb C/P	82	5	5	32,984	40,806		271	0
Camden Co Dept Hlth,NJ	Comb C/P	82	5	5	205,451	214,190	NOTE	12,813	0
St. Margaret's Hosp., MA	Comb C/P	82	5	5	223,952	223,952		3,213	0
TOTAL CITED PROJECTS					$1,318,417	$982,966		33,233	$175,720

ADOLESCENT FAMILY LIFE PROGRAM—Continued

	Project Type	Initial Funding Year	Project Period	(FY 86) Funding Year	FY 86 Award	Amount Available 4/22/87	Clients Served *	Est. '87 Awards
RELIGIOUS AFFILIATED:								
YMCA, OR	Care	83	5	4	$134,836	$59,453	311	$113,092
Sisters Charity Hlth Sys,ME	Care	84	5	3	176,231	135,686	360	153,458
Our Lady Prov Children Ctr, MA	Care	85	3	2	210,965	147,207	247	188,952
Child Saving Inst., NE	Care	86	3	1	112,729	57,952	**	112,729
Catholic Char Fargo, ND	Care	86	3	1	224,747	84,158	**	224,747
Convenent House, NY	Care	84	5	3	269,386	269,386	425	292,164
Catholic Char. USA, DC	Care	85	3	2	302,204	260,803	450	270,671
Brigham Young Univ, UT	Prev.	82	5	5	101,919	101,919	1,152	0
Emory Univ, GA	Prev.	83	4	4	69,986	51,184	6,496	0
Lutheran Fam Svs NW Ind, IN	Prev.	85	3	2	79,397	58,640	192	71,112
YMCA Maricopa Co. AZ	Prev.	86	3	1	73,474	43,706	**	73,474
St. Tier Off Soc Min, NY	Prev.	84	5	3	164,989	122,989	564	196,428
YMCA St. Peterburg, FL	Comb C/P	82	5	5	51,678	25,678	592	0
TOTAL RELIGIOUS AFFILIATED					$1,972,541	$1,418,761	10,789	$1,696,827
TOTAL EFFECTED PROJECTS					$3,290,958	$2,401,727	44,022	$1,872,547

NOTE: Projects authorized to use uncommitted prior year funds

* Clients served 1985-86

** First year projects—only estimated client counts available

NOTICE OF GRANT AWARD (Continuation Sheet)

REMARKS—Other Terms and Conditions

1. The grantee shall comply with the regulations applicable to demonstration grants under Title XX of the Public Health Service Act when such regulations are published.
2. Before a Project Director is hired or changed during the project period, the grantee shall obtain prior written concurrence from the Grants Management Officer, OPA, for the new staff member.
3. The grantee shall utilize program income in accordance with the alternative described in Code of Federal Regulations Title 45 Part 74 Subpart F.74.42(d).
4. The OAPP financial assistance includes funds for care activities only.
5. Sufficient funds shall be reserved from the approved budget for staff to attend two meetings held by the Office of Adolescent Pregnancy Programs.
6. A final progress report, evaluation report, and a Financial Status Report shall be provided within 90 days after the end of the approved Budget Period.
7. The grantee will not teach or promote religion in the AFL Title XX program. The program shall be designed so as to be, to the extent possible, accessible to the public generally.
8. No funds provided under this grant may be used for the provision of family planning services, including Natural Family Planning (other than counseling and referral services).

9. When the grantee proposes to develop informational, educational, or curriculum materials or any printed materials; i.e., public service announcements, media messages or other audio-visual material as part of the project, the grantee shall submit a draft, script, or storybook as appropriate to OAPP for approval. The grantee shall describe the proposed use in the program including the audience for which it is intended, an outline of the content, an estimate of the cost to develop and use, and methods for evaluating usefulness in the project. A copy of all final materials shall be submitted to OAPP.
10. Before utilizing existing curriculum materials, public service announcements, media messages or other audio-visual material in the project, the grantee shall obtain approval from OAPP. The request for approval shall include a current list of the materials being used, an indication of its use in the program including the audience for which it is intended, and methods for evaluating its value in the project.
11. Neither grant nor matching funds may be used for lobbying activities. OMB Circular A-122 states that costs associated with the following types of lobbying activities are unallowable when conducted in an attempt to influence the enactment of pending Federal legislation: i.e., communication with members or employees of Congress, urging members of the general public or particular groups to participate in a letter writing, telephone or lobbying campaign, and preparing, distributing or using publicity or propaganda.
12. Travel to out of state conferences and/or training sessions is limited to those sponsored by OAPP.

For FY 1984, 1985, 1986 (prevention)

NOTICE OF GRANT AWARD (Continuation Sheet)

REMARKS—Other Terms and Conditions

1. The grantee shall comply with the regulations applicable to demonstration grants under Title XX of the Public Health Service Act when such regulations are published.
2. Before a Project Director is hired or changed during the project period, the grantee shall obtain prior written concurrence from the Grants Management Officer, OPA, for the new staff member.
3. The grantee shall utilize program income in accordance with the alternative described in Code of Federal Regulations Title 45 Part 74 Subpart F.74.42(d).
4. The OAPP financial assistance includes funds for care activities only.
5. Sufficient funds shall be reserved from the approved budget for staff to attend two meetings held by the Office of Adolescent Pregnancy Programs.
6. A final progress report, evaluation report, and a Financial Status Report shall be provided within 90 days after the end of the approved Budget Period.
7. The grantee will not teach or promote religion in the AFL Title XX program. The program shall be designed so as to be, to the extent possible, accessible to the public generally.
8. No funds provided under this grant may be used for the provision of family planning services, including Natural Family Planning (other than counseling and referral services).

9. When the grantee proposes to develop informational, educational, or curriculum materials or any printed materials; i.e., public service announcements, media messages or other audio-visual material as part of the project, the grantee shall submit a draft, script, or storybook as appropriate to OAPP for approval. The grantee shall describe the proposed use in the program including the audience for which it is intended, an outline of the content, an estimate of the cost to develop and use, and methods for evaluating usefulness in the project. A copy of all final materials shall be submitted to OAPP.

10. Before utilizing existing curriculum materials, public service announcements, media messages or other audio-visual material in the project, the grantee shall obtain approval from OAPP. The request for approval shall include a current list of the materials being used, an indication of its use in the program including the audience for which it is intended, and methods for evaluating its value in the project.

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12. Travel to out of state conferences and/or training sessions is limited to those sponsored by OAPP.

For FY 1984, 1985, 1986 (combinations)

NOTICE OF GRANT AWARD (Continuation Sheet)

REMARKS—Other Terms and Conditions

1. The grantee shall comply with the regulations applicable to demonstration grants under Title XX of the Public Health Service Act when such regulations are published.

2. Before a Project Director is hired or changed during the project period, the grantee shall obtain prior written concurrence from the Grants Management Officer, OPA, for the new staff member.

3. The grantee shall utilize program income in accordance with the alternative described in Code of Federal Regulations Title 45 Part 74 Subpart F.74.42(d).

4. The OAPP financial assistance includes $____ for "Care" portion of your project and $____ for the "Prevention" portion. Expenditures for "Prevention" activities to be charged to OAPP funds may not exceed funds provided for that activity.

5. Sufficient funds shall be reserved from the approved budget for staff to attend two meetings held by the Office of Adolescent Pregnancy Programs.

6. A final progress report, evaluation report, and a Financial Status Report shall be provided within 90 days after the end of the approved Budget Period.

7. The grantee will not teach or promote religion in the AFL Title XX program. The program shall be designed so as to be, to the extent possible, accessible to the public generally.

8. No funds provided under this grant may be used for the provision of family planning services, including Natural Family Planning (other than counseling and referral services).

9. When the grantee proposes to develop informational, educational, or curriculum materials or any printed materials; i.e., public service announcements, media messages or other audio-visual material as part of the project, the grantee shall submit a draft, script, or storybook as appropriate to OAPP for approval. The grantee shall describe the proposed use in the program including the audience for which it is intended, an outline of the content, an estimate of the cost to develop and use, and methods for evaluating usefulness in the project. A copy of all final materials shall be submitted to OAPP.

10. Before utilizing existing curriculum materials, public service announcements, media messages or other audio-visual material in the project, the grantee shall obtain approval from OAPP. The request for approval shall include a current list of the materials being used, an indication of its use in the program including the audience for which it is intended, and methods for evaluating its value in the project.

11. Neither grant nor matching funds may be used for lobbying activities. OMB Circular A-122 states that costs associated with the following types of lobbying activities are unallowable when conducted in an attempt to influence the enactment of pending Federal legislation: i.e., communication with members or

employees of Congress, urging members of the general public or particular groups to participate in a letter writing, telephone or lobbying campaign, and preparing, distributing or using publicity or propaganda.

12. Travel to out of state conferences and/or training sessions is limited to those sponsored by OAPP.

NOTICE OF GRANT AWARD (Continuation Sheet)

1. The grantee shall comply with the regulations applicable to demonstration grants under Title XX of the PHS Act when such final regulations are published.

2. The grantee shall submit to the awarding office, by 11/15/82 a revised budget, and, if applicable, a revised narrative description of the program, the work plan and timetable, and estimates of numbers and types of clients to be served.

3. The grantee shall submit to the awarding office, by 11/15/82, copies of all linkage agreements (including subcontracts) negotiated by the grantee with other service providers and shall submit to the awarding office any other linkage agreements negotiated during the project period as they are finalized. A linkage agreement might include but not be limited to the following: number of pregnant adolescents, non-pregnant adolescents, and infants to be served; specific services to be provided; plan for follow-up and follow-through; plan for documentation of services provided to each applicant; monetary value of and planned charges to the grantee for the services to be performed; method of payment; the date the services are to be started; and the duration and effective date of the agreement.

4. Before a Project Director is hired or changed during the project period, the grantee shall obtain prior written approval from the Grants Management Officer, OAPP for the new staff member.

5. The grantee shall utilize program income in accordance with the alternative described in Code of Federal Regulations Title 45 Part 74 Subpart 74.42(c).

6. The grantee shall submit for OAPP prior review and approval informational and educational materials, such as curricula, media spots, films, publications proposed to be used by the project. When the project proposes to develop such materials, the grantee shall submit a concept paper for clearance before proceeding further. Where additional Departmental clearances are required, OAPP staff will forward the relevant materials to the appropriate officials.

7. The grantee shall submit a plan by 12/1/82 for involving the community, including religious and charitable organizations, voluntary associations, and other groups in the private and public sectors, in the selection and development of information and educational materials such as curricula, media spots, films, publications, etc., prior to their use in the project to assure that these materials will be appropriate to the community and in conformance with the purposes of Title XX of the PHS Act.

8. The grantee shall obtain prior written approval from the Grants Management Officer, OAPP, before obligating, for any purposes, grant funds provided for alterations and renovations. Prior approval will be based on an acceptable description

(including a working drawing) of the space to be utilized, the alternations and renovations to be performed and three (3) cost estimates for the work to be performed.

NOTICE OF GRANT AWARD (Continuation Sheet)

1. OAPP financial assistance is provided for the "Care" portion of your application only.

2. The grantee shall comply with the regulations applicable to demonstration grants under Title XX of the PHS Act when such final regulations are published.

3. The grantee shall submit to the awarding office, by 11/15/82 a revised budget, and, if applicable, a revised narrative description of the program, the work plan and timetable, and estimates of numbers and types of clients to be served.

4. The grantee shall submit to the awarding office, by 11/15/82, copies of all linkage agreements (including subcontracts) negotiated by the grantee with other service providers and shall submit to the awarding office any other linkage agreements negotiated during the project period as they are finalized. A linkage agreement might include but not be limited to the following: number of pregnant adolescents, non-pregnant adolescents, and infants to be served; specific services to be provided; plan for followup and follow-through; plan for documentation of services provided to each applicant; monetary value of and planned charges to the grantee for the services to be performed; method of payment; the date the services are to be started; and the duration and effective date of the agreement.

5. Before a Project Director is hired or changed during the project period, the grantee shall obtain prior written approval from the Grants Management Officer, OAPP for the new staff member.

6. The grantee shall utilize program income in accordance with the alternative described in Code of Federal Regulations, Title 45 Part 74 Subpart 74.42(c).

7. The grantee shall submit for OAPP prior review and approval informational and educational materials, such as curricula, media spots, films, publications proposed to be used by the project. When the project proposes to develop such materials, the grantee shall submit a concept paper for clearance before proceeding further. Where additional Departmental clearances are required, OAPP staff will forward the relevant materials to the appropriate officials.

8. The grantee shall submit a plan by 12/1/82 for involving the community, including religious and charitable organizations, voluntary associations, and other groups in the private and public sectors, in the selection and development of information and educational materials such as curricula, media spots, films, publications, etc., prior to their use in the project to assure that these materials will be appropriate to the community and in conformance with the purpose of Title XX of the PHS Act.

NOTICE OF GRANT AWARD (Continuation Sheet)

1. The OAPP financial assistance includes $75,000 for the "Prevention" portion of your project and

$150,00 for the "Care" portion. Expenditures for "Prevention" activities to be charged to OAPP funds cannot exceed the $75,000 provided for that activity.

2. The grantee shall comply with the regulations applicable to demonstration grants under Title XX of the PHS Act when such final regulations are published.

3. The grantee shall submit to the awarding office, by 11/15/82 a revised budget, and, if applicable, a revised narrative description of the program, the work plan and timetable, and estimates of numbers and types of the clients to be served.

4. The grantee shall submit to the awarding office, by 11/15/82, copies of all linkage agreements (including subcontracts) negotiated by the grantee with other service providers and shall submit to the awarding office any other linkage agreements negotiated during the project period as they are finalized. A linkage agreement might include but not be limited to the following: number of pregnant adolescents, non-pregnant adolescents, and infants to be served; specific services to be provided; plan for follow-up and follow-through; plan for documentation of services provided to each applicant; monetary value of and planned charges to the grantee for the services to be performed; method of payment; the date the services are to be started; and the duration and effective date of the agreement.

5. Before a Project Director is hired or changed during the project period, the grantee shall obtain prior written approval from the Grants Management Officer, OAPP for the new staff member.

6. The grantee shall utilize program income in accordance with the alternative described in Code of Federal Regulations Title 45 Part 74 Subpart 74.42(c).

7. The grantee shall submit for OAPP prior review and approval informational and educational materials, such as curricula, media spots, films, publications proposed to be used by the project. When the project proposes to develop such materials, the grantee shall submit a concept paper for clearance before proceeding further. Where additional Department clearances are required, OAPP staff will forward the relevant materials to the appropriate officials.

8. The grantee shall submit a plan by 12/1/82 for involving the community, including religious and charitable organizations, voluntary associations, and other groups in the private and public sectors, in the selection and development of information and educational materials such as curricula, media spots, films, publications, etc., prior to their use in the project to assure that these materials will be appropriate to the community and in conformance with the purposes of Title XX of the PHS Act.

State of Florida
County of Pinellas

AFFIDAVIT

I, Peggy Sanchez, being first duly sworn, make the following statement upon personal knowledge:

1) Project H.E.L.P. is a comprehensive adolescent pregnancy program administered by the YWCA of St. Petersburg in conjunction with the Pinellas County School Board. Client population includes 250 pregnant and parenting adolescents, 180 infants, 125 families, 75 fathers of babies, and over 3,000 youth and adults that participate in community education programs. The total directly affected by this program include more than 3,630 individuals.

(See attached description of the program.)

2) If the funding is withheld, the following will immediately result:

A. Layoff of four staff members.

1. Position of Maintenance/Van Driver.

Impact: Clients could not come to school since they depend upon the van for transportation. Health code violations would result in the classrooms, nursery, and lunchrooms because no maintenance staff would be available to dispose of soiled diapers, change bedding in cribs, wash nursery equipment, dispose of trash resulting from daily lunches for clients, or maintain sanitary bathrooms. Medical appointments could not be kept by clients without transportation from the van driver.

2. Position of Childbirth Educator.

Impact: No childbirth preparation classes would be available to high risk pregnant adolescents.

3. Position of Secretary/Bookkeeper.

Impact: No client intake forms, bookkeeping

records, personnel files could be maintained. Reports, applications, evaluations and other necessary tools demonstrating agency accountability would not be maintained.

4. Position of Data Manager.

Impact: No case management of clients could be maintained, valuable research and demonstration data would be lost. No evaluation of the program could be conducted. The dollars expended to date would virtually be wasted without the ability to produce final research results.

B. Financial obligations of the lease on the facility used for this program could not be met, resulting in eviction. The lease specifies that if the YWCA breaches the terms of the lease, the full six year financial commitment of $314,200 is obligated to be paid. This would bankrupt the organization and force closure of Project H.E.L.P., the family emergency shelter, the job training programs, and the daycare centers operated by the YWCA of St. Petersburg.

C. Agency clients, who are pregnant teenagers, would suffer from loss of an academic education, which results in increased government dependency. In addition, these girls would not have access to prenatal/pediatric care resulting in an increased number of costly, complicated deliveries and increased number of birth defects. Our girls would experience second pregnancies at a faster rate without necessary intervention. Nationally, over 40% of adolescents experience a second pregnancy in less than two years, compared to our girls that experience a second pregnancy at a rate of less than 5%.

D. The most distressful consequences cannot be measured in dollars. Our girls have no program in the county to go to if Project H.E.L.P. closed. Project H.E.L.P. is the only core teen pregnancy program in

the county. The consequences in human costs would be dramatic:

Loss of education
Welfare dependency
Second pregnancy
Birth defects
Maternal health risks
Increased child abuse
Lack of parent/infant bonding
Stressful family situations
No daycare for infants
Developmental delays among infants

Further Affiant sayeth not.

/s/ PEGGY SANCHEZ
Peggy Sanchez
Executive Director of the
YWCA of St. Petersburg

Sworn to and subscribed before me this 24th day of April 1987.

/s/ EDNA CIMINERO
Edna Ciminero
Notary

PROJECT H.E.L.P.

YWCA OF ST. PETERSBURG

SUMMARY

The goals of the teenage pregnancy program are:

* To coordinate the delivery of health, educational and social services to pregnant adolescents in Pinellas County.
* To provide educational activities aimed at the responsibilities of sexuality and parenting.

Both branches of Project H.E.L.P. are housed in centrally located facilities where pregnant adolescents receive personal counseling, academic and life skills education (child care, parenting, nutrition, family planning information, and infant growth, development and stimulation), adoption counseling, and childbirth preparation. Necessary pre and postnatal care will be arranged for the adolescent. Referrals will be made for the pediatric care for the infant. The father of the child and the family of the pregnant adolescent client will be included in the program to the maximum extent possible. Services are available :30-5:00, five days per week.

Necessary support services include transportation, daily lunch, and a child care facility for the parenting adolescents.

The community education component of the program offers consultation and educational services to youth in schools, youth serving agencies, churches and other interested community organizations. A peer panel consisting of pregnant and parenting adolescents will participate in these educational programs.

Follow-up services are conducted at 6, 12, and 24 months postpartum to determine medical, social, and academic status of the adolescent mother and infant.

An evaluation is conducted by Dr. Danny L. Jorgensen, University of South Florida, Department of Sociology, to determine the impact of the Project.

given to us by telephone and set forth at Tab C to the declaration was in error. The following information relating to Project #106 (Services for Unmarried Parents and Specialized Adoptions (SUMA), OH) at Tab C of the May 12 declaration should be corrected to read as follows:

Catholic Social Services (Social Worker) $54,173.97

I declare under penalty of perjury that the above statements are true and correct. Executed this 14th day of May, 1987 at Washington, D.C.

/s/ JO ANN GASPER

Jo Ann Gasper

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 83-3175

CHAN KENDRICK, ET AL., PLAINTIFFS,

v.

OTIS R. BOWEN, M.D., DEFENDANT,

and

SAMMIE J. BRADLEY, ET AL., DEFENDANTS-INTERVENORS

SECOND SUPPLEMENTAL DECLARATION OF JO ANN GASPER

Jo Ann Gasper declares and states as follows:

1. This declaration is submitted to supplement my declaration of May 12, 1987, in this action.

2. The information regarding Families of the Americas Foundation at Tab B of the May 12th declaration should be revised to show the amount available as of April 22, 1967, as $116,550.00. Attached at Tab A is a letter from the Executive Director of Family of the Americas Foundation, Inc.

3. I am also supplementing the information at Tab B of the May 12th declaration with the information attached at Tab B hereto.

4. Attached at Tab C is information supplementing the information on subgrantees at Tab C of my May 12th declaration.

5. My staff was informed subsequent to the filing of my May 12 declaration that certain information previously

State	Actual FY 1986	Balance in Pay. Sys.
California	$214,745	$154,563
New Hampshire	$49,217	$41,015
Michigan	$76,560	$73,561
Georgia	$68,357	$51,269
New Mexico	$109,429	$162,663
Guam	$97,600	$137,692
Montana	$57,349	$57,349
Puerto Rico	$139,510	$396,849
Mississippi	$34,302	$39,405
Idaho	$149,321	$144,673
Illinois	$93,478	$99,101
South Carolina	$168,606	$148,887
Rhode Island	$143,550	$272,523
Louisiana	$65,076	$78,771
Vermont	$145,791	$144,791

Balances in Payment System as of 5-14-87

Grant Number	Grantee	City
101	Fam. Ser. Ag., San Fran.	San Francisco
103	Visiting Nurse Assn.	Manchester
104	Wayne Cty Interm Sch Dist	Lincoln Park
107	Parent & Child Dev Ctr	Savannah
108	La Clinica de Familia, Inc	Las Cruces
109	Dept of Pub Hlth & Soc Serv	Agana
112	Young Families Prog Inc	Billings
113	Caguas Reg Hosp	Caguas
114	Exchange Club Par Child Ctr	Jackson
117	Comm Health Cls, Inc	Nampa
118	U of IL, Sch of Soc Wrk	Urbana
120	Flor Crittenton Hm & Hosp	Charleston
121	RI Dept of Human Serv	Cranston
122	LA St Off of Gov, Off of Women's Servs	Baton Rouge
123	Northern Counties H.C. Inc	St. Johnsbury

Grant Number	Grantee	City	State	Actual FY 1986	Balance in Pay. Sys.
125	Child & Fam Serv Knox Cty	Knoxville	Tennessee	$221,366	$190,070
127	Panhandle Comm Serv	Scottsbluff	Nebraska	$79,438	$63,582
302	Mt Vernon Pub Schools	Mt Vernon	New York	$95,869	$77,071
303	Univ of S Carolina	Columbia	South Carolina	$50,707	$42,120
313	Med Care Dev, Inc	Augusta	Maine	$83,295	$59,207
314	Marg Hudson Program Inc	Tulsa	Oklahoma	$54,894	$64,864
315	Montana St Univ	Bozeman	Montana	$108,625	$117,275
316	The Guidance Center	Smethport	Pennsylvania	$55,001	$51,478
318	SD Dept of Hlth	Pierre	South Dakota	$94,303	$135,837
320	Gavernor's Office of F-ST	Jackson	Mississippi	$22,340	$22,340
321	N Cent MH Services	Columbus	Ohio	$39,438	$22,079
322	Jackson St U	Jackson	Mississippi	$57,542	$55,400
323	Milwaukee Comp CH, Inc	Milwaukee	Wisconsin	$88,217	$88,217
501	Greene Cty Health Care	Snow Hill	North Carolina	$103,901	$79,461
502	Family Hosp	Milwaukee	Wisconsin	$139,722	$89,736
503	Lexington-Fayette Cty HD	Lexington	Kentucky	$99,528	$71,272
504	Hull House Assn	Chicago	Illinois	$143,965	$79,869

Grant Number	Grantee	City	State	Actual FY 1986	Balance in Pay. Sys.
505	Economic Opportunity	Miami	Florida	$80,746	$60,723
506	Tacoma-Pierce Cty HD	Tacoma	Washington	$124,940	$101,050
508	E Conn Parent-Child Ctr	Putnam	Connecticut	$71,567	$73,989
510	City of Gary	Gary	Indiana	$54,297	$87,424
511	Tucson Unified Sch Dist #1	Tucson	Arizona	$132,660	$117,444
512	Mtrnl & Fam Hlth Serv Inc	Wilkes Barre	Pennsylvania	$87,661	$73,050
513	Douglas Cherokee Econ Auth	Morristown	Tennessee	$151,980	$128,696
515	Hill Health Corp	New Haven	Connecticut	$62,705	$66,304
516	Child Oppt Prog Inc	Denver	Colorado	$99,355	$88,667
519	St Mary Human Dev Ctr Inc	Ridgeland	South Carolina	$137,170	$113,764
520	Norfolk State Univ	Norfolk	Virginia	$89,343	$75,607
521	Addison Cty Prnt/Child Ctr	Middlebury	Vermont	$109,098	$72,071
701	C Henderson Child Hlth Ctr	Troy	Alabama	$173,502	$125,680
702	St Paul Ramsey Med Ctr	St Paul	Minnesota	$160,776	$127,251
703	Cities-in-Schools Inc	Washington	Dist of Columbia	$288,145	$210,117
705	SEMo Assn Of Pub Hlth Adm	Kennett	Missouri	$44,199	$51,023
706	Prov Amb Hlth Care Fdn	Providence	Rhode Island	$100,294	$85,889

Grant Number	Grantee	City	State	Actual FY 1986	Balance in Pay. Sys.
710	Univ of Utah	Salt Lake Cy	Utah	$108,092	$92,470
712	Youth Health Services, Inc	Elkins	West Virginia	$139,722	$135,317
713	Salem YWCA	Salem	Oregon	$69,065	$59,483
714	Camden County D of H	Camden	New Jersey	$86,187	$81,145
715	Fam. Ser. Ag. of San Fran	San Francisco	California	$86,187	$66,304
716	Covenant House	New York	New York	$86,187	$84,322
717	Tucson Unified Sch Dist	Tucson	Arizona	$86,187	$83,641
718	Parent & Child Dev Ctr	Savannah	Georgia	$86,187	$86,187
802	COSSMHO	Washington	Dist of Columbia	$281,888	$235,779
805	Nat Urban League	New York	New York	$97,205	$193,881
806	Adoption Serv of WACAP	Port Angeles	Washington	$266,592	$128,823
809	Univ of TX Hlth Sc Ctr	Dallas	Texas	$326,894	$416,981
810	Bank St Coll of Ed	New York	New York	$238,870	$202,123
812	Am Assn for Couns & Dev	Alexandria	Virginia	$152,428	$128,841
813	UT St Univ	Logan	Utah	$142,083	$154,452
814	American Red Cross	Washington	Dist of Columbia	$164,437	$174,453
815	Boys Clubs of Am	New York	New York	$155,112	$138,668
816	Comm on Status of Women	Glenview	Illinois	$132,510	$55,240
TOTAL				$7,825,313	$7,489,849

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 83-3175

CHAN KENDRICK, ET AL., PLAINTIFFS,

v.

OTIS R. BOWEN, M.D., SECRETARY OF HEALTH AND HUMAN SERVICES, DEFENDANT,

and

SAMMIE J. BRADLEY, ET AL., DEFENDANTS-INTERVENORS

DECLARATION OF JO ANN GASPER

Jo Ann Gasper declares and states as follows:

1. I am the Deputy Assistant Secretary for Population Affairs (DASPA) of the Department of Health and Human Services. I have held this position since April 14, 1985. I have the delegated authority for administering the program of demonstration grants authorized by Title XX of the Public Health Service Act, 42 U.S.C. 300z, *et seq.* By virtue of my position, I supervise the project officers and other staff who carry out the program's operations. My responsibilities for administering the grant program include responsibility for determining the policies for and overseeing the process of making grant awards under Title XX. I am also responsible for monitoring and enforcing grantees' compliance with the terms and conditions of their grant awards. In order to carry out these responsibilities, I have my staff keep me informed on a daily basis of problems and issues encountered in administering

the grant program. I am thus intimately familiar with the process for awarding and monitoring grants under Title XX.

2. I also have the delegated authority for administering on a national basis the program of family planning services authorized by Title X of the Public Health Service Act, 42 U.S.C. 300 *et seq*. By virtue of my position, I am responsible for, among other things, allocating Title X funds throughout the nation and monitoring Title X expenditures on a national basis. As DASPA, I also have the statutory authority for providing policy input into and acting as a liaison for other federal programs that involve, to any extent, family planning concerns, such as the Maternal and Child Health block grant program authorized by Title V of the Social Security Act (MCH), 42 U.S.C. 701, *et seq*. The statements below are based on my personal knowledge and on information provided by my staff.

3. I have read plaintiffs' Memorandum in Response to Court's Order of April 15, 1987 in Opposition to Severance and in Favor of Declaring the Adolescent Family Life Act Unconstitutional in its Entirety (Plaintiffs' Memorandum). Point III of the Argument section of Plaintiffs' Memorandum (pp. 25-28) contains numerous statements which, if they ever were true, have no relationship to the Title XX program as I have administered it. Plaintiffs' Memorandum also contains misleading statements elsewhere as to the dimension of Federal assistance available for pregnant adolescents and adolescent parents and other characteristics of related federal programs. The information below is provided to set the record straight.

4. The process whereby Title XX demonstration grants are awarded by my office has typically been the following:

a. A Request for Application (RFA) is published in the *Federal Register* to alert potential grantees as to the availability of funds for award and to advise them how to

apply for grants. The RFAs published since I became DASPA contain a statement that grantees under Title XX are prohibited from teaching or promoting religion in the grant-supported project. Copies of the RFAs for Fiscal Years (FY) 1985, 1986 and 1987 are attached at Tab A.

b. The procedure followed by my office in reviewing grant applications in FYs 1985, 1986 and 1987 is set out in the document "Objective Review Process for AFL Demonstration Proposals," a copy of which is attached at Tab B. The purpose of the process is to determine which applications have the highest potential for providing cost effective services consistent with the purposes of the statute. I describe below relevant aspects of that process.

c. Independent outside reviewers are selected to review the grant applications submitted pursuant to an RFA. In recommending reviewers, I require my staff to look for individuals who represent various disciplines and technical expertise in fields relating to adolescent pregnancy. See Tab B (#2). I do not consider religious affiliation or the lack of such affiliation in selecting reviewers.

d. After the reviewers are selected, they are brought together in an orientation meeting. At the meeting, my staff tells them that they are responsible for screening for, among other things, an indication in the grant applications they review of "prohibited activities."[1] Staff explains that,

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[1] The Title XX statute contains statutory restrictions on providing family planning services and the provision of abortion. The restriction on the provision of family planning services is contained at 42 U.S.C. 300z-3(b)(1); this restriction is not intended to prevent access to family planning services by participants in Title XX projects, but rather to insure utilization of existing family planning services and thereby avoid duplication of services. The abortion restrictions are contained at 42 U.S.C. 300z-10. Finally, the teaching or promoting of religion is prohibited, as is limitation of access to the grant-supported program on a denominational basis. See paragraph 5 below.

among other things, grantees are prohibited from teaching or promoting religion in the grant-supported project; they are also told that the proposed project must be accessible to the public generally, and not just to members of a particular religious denomination. In addition, they are given grant review forms on which to note such information. Copies of the forms for FYs 1985, 1986 and 1987 are attached at Tab C.

e. Each grant application is reviewed by a panel of five reviewers. The review panels determine if an application is technically acceptable. An application is determined to be technically acceptable if it meets the requirements contained in the Title XX statute and applicable regulations. If a review panel determines that an application is not acceptable, it is not considered by me for funding. If a review panel determines that an application is technically acceptable, the panel recommends either approval or approval with modification. The proposal is scored by each of the panelists. Approval with modification occurs when the reviewers have some concern about the ability of the program as proposed to meet the goals of the statute.

f. If any of the reviewers has noted an indication of a prohibited activity in the grant application, the issue is reviewed by my staff. My staff reviews every application approved for funding by the reviewers and is also responsible for making comments in addition to those made by the reviewers, including noting any indication that the applicant might teach or promote religion in the proposed project. See Tab B (#12). If my staff concludes, after reviewing the relevant information, that a potential exists for teaching or promoting religion or limiting access if the proposed project is funded, the matter is reviewed by our lawyers. If the problem can be remedied, the applicant is required to revise its proposed project. If my staff or our lawyers were to determine that there is a potential problem with religion in the proposed project that cannot be

remedied prior to grant award, I would not fund the application.

g. Once the review is completed, I make decisions based on the criteria contained in the RFA. Decisions are made solely on the basis of an applicant organization's ability to carry out the purposes of the statute. Decisions are not based on whether or not an organization is religiously affiliated.

5. Each grant that is awarded in Title XX has been, during my tenure, subject to the following condition: "The grantee will not teach or promote religion in the AFL Title XX program. The program shall be designed so as to be, to the extent possible, accessible to the public generally." In addition, any grant which proposes to develop informational, educational, or curriculum materials is subject to the condition that "the grantee shall submit a draft . . . to OAPP for approval. . . . A copy of all final material shall be submitted to OAPP for approval." See Tab D to my declaration of May 12, 1987.

6. Following grant award, my staff monitors grantees for compliance with these grant conditions. This monitoring activity typically occurs in several ways:

a. At the beginning of each new grant cycle, my office holds an orientation meeting for new grantees. The grantees are specifically told that they may not engage in teaching or promoting religion within their projects and that their projects must be accessible to the public generally. We invite questions and answer any questions they have on this topic. Thus, they are specifically warned of this restriction before they begin to develop curricula, staff training, counselling materials or other materials under the grant.

b. Grantees are required to submit to my office for review all informational, educational or curriculum materials proposed for development for use in the project. When such materials are submitted for review, my staff

reviews them for, among other things, the presence of any language suggesting the teaching of religion. This element of the review process is explicitly embodied in the review forms that my staff is directed to use. See Tab D. The curriculum or other material is not approved until the non-complying material is removed.

c. Where my staff finds, in the course of ongoing monitoring activity[2] or outside correspondence, that there may be a problem with the compliance by a grantee with the grant award condition relating to religion, they are under standing instructions to investigate the matter. Although we have found almost no instances of non-compliance in the program as a whole, I have terminated one grantee (Catholic Charities of the Diocese of Arlington) for failure to make its program accessible to the public generally.

7. The argument at pages 16-17 of Plaintiff's Memorandum that Title XX receives a "very small proportion" of the federal funding for adolescent pregnancy is in my opinion misleading. Plaintiffs' Memorandum compares the total of the appropriation for two major federal programs, Title X and MCH, and contrasts them to the small appropriation for Title XX. However, under neither Title X nor MCH is the majority of the appropriation allocated to services to adolescents. According to our figures, approximately ⅓ of the Title X appropriation is available for services to adolescents. See Tab E. Moreover, the Title X program is limited in the services it provides to services related to family planning. The MCH appropriation is available, by statute, for a complete range of medical and other services to women of childbearing age and children, including: rehabilitation services for blind and disabled children under 16; medical, surgical, corrective and other services for diagnosis, hospitalization and aftercare for crippled children; immunizations, diagnostic and treatment services for low income mothers (irrespective of age) and children; and medical, surgical, corrective and other services for children with "special health care needs" or suffering from related conditions. See 42 U.S.C. 701(a). Thus, it is my understanding that the minor part of the MCH appropriation is in fact available to provide the types of services provided under Title XX. Indeed, the General Accounting Office has recognized that Title XX is the only Federal program extant that specifically focuses on the multi-faceted problems of teenage pregnancy:

> Many Federal programs are currently relevant in some measure to pregnant and parenting teenagers. However, only the Adolescent Family Life Program (AFL) is uniquely targeted to preventing teenage pregnancy and to providing services to pregnant and parenting teenagers and their families. Nine other Federal programs may provide services to these groups; three make teenagers a primary target group. Unfortunately, there are few available data on how much money these Federal programs spend on pregnant and parenting teenagers.

Letter from Eleanor Chelimsky, Director, Program Evaluation and Methodology Division, GAO, transmitting GAO Report No. GAO PMED-86-16BR. See also page 14 of the Report. See Tab F.

8. Plaintiffs incorrectly state that the "AFLA prohibits any funding to groups which provide abortions or abortion counselling or referrals or subcontracts with groups or persons which do so or which are deemed to advocate, encourage or promote abortion. . . ." Plaintiffs' Memorandum, at p. 5. The statute does not prohibit funding to groups which engage in abortion counseling, abortion referral or otherwise advocate, encourage or promote abortion, as long as these activities are not part of the Title XX project.

---

[2] Such activity includes site visits and annual progress reports.

9. Title XX requires grantees to provide counselling and referral services which present adoption *as an option*. 42 U.S.C. 300z- 1 (a) (4) (B). The legislative history indicates that the intent of this provision was to rectify the historical lack of such services for teenagers, which meant that adolescents were in effect not presented with sufficient information on which to make an informed decision regarding adoption. S.Rep. No. 161, 97th Cong., 1st Sess. 10 (1981). This promotion of adoption and premarital abstinence as options and restrictions on the provision of abortion are integral parts of many federal programs which provide services to adolescents. For example, Title X training grantees are required to provide training on adoption. Adoption referral and counseling are also services which Title X service grantees provide. The Title X service grantees are also required by guidelines to counsel teenagers on abstinence. Other programs funded by this Department which provide services relating to adolescent pregnancy of which I am aware also provide support for adoption and adolescent abstinence from premarital sexual relations as options. Furthermore, in all programs funded under the Departmental appropriation, the provision of abortion (except in very limited circumstances) has been prohibited since 1976.

I declare under penalty of perjury that the above statements are true and correct. Executed this 4th day of June, 1987 at Washington, D.C.

/s/ JO ANN GASPER

Jo Ann Gasper

AFL DEMONSTRATION PROJECTS FUNDED

Grant	Grantee	Funding FY 86	Funding FY 85	Funding FY 84	Funding FY 83	Funding FY 82	Total Funding	Projected FY 87 Awards
CARE PROJECTS:								
101	Family Service Agency, CA	$214,745	$264,290	$337,025	$337,025	$337,025	$1,490,110	$0
102	Louisiana DHHS, (Baton Rouge) LA	NOTE C	57,608	102,000	120,000	120,000	399,608	0
103	Visiting Nurses Assn. NH	49,217	64,285	77,143	90,000	90,000	370,645	0
104	Wayne County Sch. Dist. MI	76,560	100,000	120,000	140,000	140,000	576,560	0
105	St. Ann's Inf & Mat. MD	104,683	136,734	171,428	235,000	200,000	847,845	0
106	SUMA, OH	0	0	180,000	160,000	185,600	525,600	0
107	Parent/Child Dev Sys, GA	68,357	85,714	100,000	101,500		355,571	57,142
108	La Clinica de Familia, NM	109,429	85,106	125,000	125,000		444,535	86,640
109	Dept of PubHlth/Soc Sys, Guam	97,600	113,318	80,000	80,000		370,918	81,588
110	Father Flanagan's Boys-Home, NB	0	112,072	135,150	135,150		382,372	0
111	YWCA, OR	134,836	165,248	183,281	183,281		666,646	113,092
112	Young Families Prog, MT	64,849	62,414	62,414			189,677	49,938
113	Caguas Regional Hosp. PR	139,510	163,756	129,000			432,266	121,482
114	Exch. Club Parent/Child Ctr, MS	34,302	42,692	40,817			117,811	29,869
115	Sisters of Charity HlthSys, ME	176,231	214,840	145,000			536,071	153,458
116	Salvation Army Mat. Home, OK	20,734	136,430	145,744			302,908	0
117	Community Hlth Clinics, ID	149,321	156,030				305,351	133,740

Grant	Grantee	Funding FY 86	Funding FY 85	Funding FY 84	Funding FY 83	Funding FY 82	Total Funding	Projected FY 87 Awards
CARE PROJECTS:								
118	Univ of Illinois (Urbana), IL	99,379	92,032				191,411	41,971
119	Our Lady Prov Children's Ctr, MA	210,965	209,523				420,488	188,952
120	Florence Crittenton H/Hosp, SC	168,606	172,593				341,199	75,101
121	Rhode Island Dept Human Sys, RI	143,550	150,000				293,550	128,572
122	LA State Off (Baton Rouge), LA	65,076	NOTE C				65,076	0
123	N. Counties Hlth Cntrs, VT	145,791					145,791	145,791
124	Child Saving Institute, NE	112,729					112,729	112,729
125	Child/Family Sys Knox Co., TN	221,366					221,366	221,366
126	Catholic Char of Fargo, ND	224,747					224,747	224,747
127	Panhandle Comm. Sys., NB	79,438					79,438	79,438
702	St. Paul-Ramsey Med Ctr, MN	160,776	210,000	252,000	291,626	284,000	1,198,402	0
703	Cities in Schools, GA	288,145	340,000	408,000	473,540	380,000	1,889,685	0
706	Providence Amb. Hlth CareFdn, RI	100,294	131,000	144,000	138,000	138,000	651,294	0
710	Univ of Utah, UT	108,092	144,167	173,000	175,000	165,000	765,259	0

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Grant	Grantee	Funding FY 86	Funding FY 85	Funding FY 84	Funding FY 83	Funding FY 82	Total Funding	Projected FY 87 Awards
CARE PROJECTS:								
803	Manpower Demo Research, NY	0	180,000	136,023	236,000		552,023	0
806	Adoption Sys of WACAP, WA	266,592	291,250	325,000			882,842	232,143
807	Covenant House, NY	269,386	409,029	350,000			1,028,415	292,164
809	Univ of Texas Hlth Sci Ctr, TX	326,894	470,700	371,000			1,168,594	341,572
810	Bank St. College of Ed, NY	238,870	273,000	300,000			811,870	0
811	Catholic Charities USA, DC	302,204	315,783				617,987	270,671
813	Utah State Univ, UT	142,083	148,467				290,550	127,257
PREVENTION PROJECTS:								
301	Galludet College, DC	0	43,430	86,000	100,000	100,000	329,430	0
302	Mt. Vernon Public Sch, NY	95,869	116,486	98,000	100,000	100,000	510,355	0
303	Univ. of South Carolina, SC	50,707	66,961	67,224	25,000	50,000	259,892	0
304	Lutheran Family Services, IA	0	0	0	28,700	29,043	57,743	0
305	Cath. Char., Arlington, VA	0	0	64,286	75,000	75,000	214,286	0
306	Brigham Young Univ. UT	101,919	133,123	157,969	185,423	185,423	763,857	0
307	Cath Soc Sv of Wayne Co, MI	42,876	41,334	73,600	85,000	85,000	327,810	0
308	DHHR, (New Orleans), LA	20,290	62,260	65,712	66,664	82,000	296,926	0
309	Minnesota Institute, MN	0	94,429	111,394	120,000	120,000	445,823	0
310	Community Hlth Clinics, ID	0	0	41,745	3,000	95,000	139,745	0
311	County Adol. of Berkshire, MA	0	0	75,436	77,775	70,000	223,211	0

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Grant	Grantee	Funding FY 86	Funding FY 85	Funding FY 84	Funding FY 83	Funding FY 82	Total Funding	Projected FY 87 Awards
CARE PROJECTS:								
312	Emory Univ., GA	69,986	81,435	100,696	99,971		352,088	0
313	Medical Care Dev., ME	83,295	101,544	101,544			286,383	0
314	Margaret Hudson Prog., OK	54,894	66,920	66,920			188,734	47,800
315	Montana State Univ., MT	108,625	85,780	84,000			278,405	90,321
316	Guidance Center, PA NOTE A	55,001	71,987	76,000			202,988	0
317	Lutheran Fam. Sys. NW Indiana, IN	79,397	82,964				162,361	71,112
318	S Dakota Dept of Health, SD	94,303	98,540				192,843	84,463
319	YWCA Maricopa Co. AZ	73,474					73,474	73,474
320	Gov. Off Fed/State Prog. MS	22,340					22,340	22,340
321	N. Cen. Mental Hlth. Sv., OH	39,438					39,438	39,438
322	Jackson State Univ, MS	57,542					57,542	57,542
323	Milwaukee Comp Comm Hlth, WI	88,217					88,217	88,217
705	SE Mo Assn of Pub Hlth Adm, MO	44,199	47,598	85,740	100,000	100,000	377,537	0
707	CEMP Counseling Sys Dept, PA	0	0	NOTE A	88,734	120,000	208,734	0
709	Univ of Arkansas, AR	0	0	0	0	55,000	55,000	0
801	Search Institute, MN	236,988	208,099	318,527	318,527		1,082,141	175,720

Grant	Grantee	Funding FY 86	Funding FY 85	Funding FY 84	Funding FY 83	Funding FY 82	Total Funding	Projected FY 87 Awards
PREVENTION PROJECTS:								
802	COSSMHO, DC	281,888	353,464	395,985	395,985		1,427,322	235,643
804	Family of the Americas, LA	239,250	300,000	350,000	350,000		1,239,250	0
805	National Urban League, NY	97,205	193,574	201,785			492,564	0
808	Southern Tier Off. Soc. Min., NY	164,989	275,000	275,000			714,989	196,429
812	Amer Assoc Counsel/ Devel, VA	152,428	100,432				252,860	140,076
814	American Red Cross, DC	164,437	174,960				339,397	149,966
815	Boys Clubs of America, NY	155,112	162,081				317,193	138,936
816	Comm. on Status of Women, IL	132,510	101,901				234,411	87,344
COMBINATION PROJECTS:								
501	Greene Cty Hlth Care, NC	103,901	135,715	145,000	190,000	190,000	764,616	0
502	Family Hospital, WI	139,722	182,501	219,000	208,305	255,000	1,004,528	0
503	Lexington-Fayette CHD, KY	99,528	130,000	150,000	145,000	125,000	649,528	0
504	Hull House Assn, IL	143,965	180,543	190,000	186,466	225,000	925,974	0
505	Economic Opportunity, FL	80,746	38,146	72,857	85,000	85,000	361,749	0
506	Tacoma-Pierce Cty HD, WA	124,940	111,172	186,000	217,000	205,000	844,112	0
507	State of Hawaii, HA	107,271	96,900	129,000	60,000	200,000	593,171	0

Grant	Grantee	Funding FY 86	Funding FY 85	Funding FY 84	Funding FY 83	Funding FY 82	Total Funding	Projected FY 87 Awards
COMBINATION PROJECTS:								
508	E. Conn Par/Child Res, CN	71,567	100,629	175,424	195,000	195,000	737,620	0
509	YWCA of St. Petersburg, FL	51,678	67,500	69,000	70,000	70,000	328,178	0
510	City of Gary-Emerg Ref Sv, IN	54,297	12,833	85,105	99,289	100,000	351,524	0
511	Tucson Unified Sch Dist, AZ	132,660	160,370	207,929	225,000	225,000	950,959	0
512	Maternal & Family Hlth Sys, PA	87,661	114,500	129,000	150,000	150,000	631,161	0
513	Douglas Cherokee Econ Auth, TN	151,980	131,406	257,143	300,000	361,000	1,201,529	0
514	Catholic Fam Sys (Amarillo), TX	104,672	203,875	214,000	250,000	250,957	1,023,504	0
515	Hill Health, CN	124,608	20,000	131,527	139,938	165,000	581,073	0
516	Child Opportunity Prog, CD	100,863	184,286	221,143	273,000	258,000	1,037,292	0
517	Lyon County HD, KS	32,984	60,603	71,000	82,000	82,000	328,587	0
518	Discovery Room for Children, NY	0	0	0	100,000	175,000	275,000	0
519	St. Mary Hlth Dev Ctr, SC	137,170	161,904	215,000	250,000	300,000	1,064,074	0
520	Norfolk State Univ, VA	89,343	91,478	155,000	165,000	150,000	650,821	0
521	Addison Co P/C Ctr, VT	109,098	142,500	171,000	140,718	140,718	704,034	0
522	Camden Co Dept of Hlth, NH	205,451	290,531	360,000	420,000	420,000	1,695,982	0
701	C. Henderson Child Hlth Ctr, AL	173,502	226,622	271,947	287,000	298,[illegible]	1,257,071	0
704	Memorial General Hosp, WV	0	171,300	219,000	255,000	215,000	860,300	0

AFL DEMONSTRATION PROJECTS FUNDED

Grant	Grantee	Funding FY 86	Funding FY 85	Funding FY 84	Funding FY 83	Funding FY 82	Total Funding	Projected FY 87 Awards
COMBINATION PROJECTS:								
708	St. Mary's Hospital, MD	0	0	144,097	155,000	180,000	479,097	0
711	St. Margaret's Hospital, MA	223,952	292,519	402,000	466,000	494,647	1,879,118	0
712	Youth Health Sys, WV (NOTE B)	139,722	17,200				156,922	0
	Total Demo Regular Awards	$10,640,826	$11,734,557	$12,061,263	$10,251,106	$8,756,868	$53,444,620	$5,008,244
	Supplemental Awards	72,991	152,859	20,497	104,511	64,545	415,403	0
	Total for Fiscal Year	$10,713,817	$11,887,416	$12,081,760	$10,355,617	$8,821,413	$53,860,023	$5,008,244

NOTES:

A-CEMP (#707) trans. to Guidance Ctr (#316)
B-MemGenHosp (#704) transferred $17,200 to Youth Hlth Sys (#713)
C-LA DHHS (#102) trans to LA State Off. (#122)

Television audience potential of 952,000

Janet Benshoof
American Civil Liberties
Union Foundation
132 West 43rd St.
New York, NY 10036

May 6, 1987

Dear Janet:

Pursuant to your request in our telephone conversation of this morning, it is my understanding that action has been taken to halt funding for the following grants:

St. Ann's Infant and Maternity Home	Hyattsville, MD
YWCA	Salem, OR
Sisters of Charity Health Systems, Inc.	Lewiston, ME
Our Lady of Providence Children's Center	West Springfield, MA
Child Saving Institute	Omaha, NE
Catholic Charities	Fargo, ND
Catholic Social Services	Wayne County, MI
Lutheran Family Services of NW Indiana	Merrillville, IN
YWCA of Maricopa County	Phoenix, AZ
YWCA	St. Petersburg, FL
Catholic Family Services	Amarillo, TX
Lyon County Health Dept.	Emporia, KA
Camden County Health Dept.	Camden, NJ
St. Margaret's Hospital	Boston, MA
Search Institute	Minneapolis, MN
Family of the Americas	Mandevill, LA
Covenant House	New York, NY
Southern Tier Office of Social Ministry	Elmira, NY

Catholic Charities USA	Washington, DC
BYU	Provo, UT
Dept. of Health and Human Resources	New Orleans, LA
Emory University	Atlanta, GA
Dept. of Health	Honolulu, HA

I trust that the foregoing is responsive to your request.

Sincerely,

/s/ THOMAS MILLET

Thomas Millet
Senior Trial Attorney
Federal Programs Branch
Civil Division

Supreme Court of the United States

No. 87-253

OTIS R. BOWEN, SECRETARY, DEPARTMENT OF HEALTH AND HUMAN SERVICES, APPELLANT

v.

CHAN KENDRICK, ET AL.

APPEAL from the United States District Court for the District of Columbia.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

This case is consolidated with 87-431, *Otis R. Bowen, Secretary, Department of Health and Human Services* v. *Chan Kendrick, et al.* and 87-462, *Chan Kendrick, et al.* v. *Otis R. Bowen, Secretary of Health and Human Services, et al.* and a total of one hour is allotted for oral argument.

November 9, 1987

Supreme Court of the United States

No. 87-431

OTIS R. BOWEN, SECRETARY, OF HEALTH AND HUMAN SERVICES, APPELLANT

v.

CHAN KENDRICK, ET AL.

APPEAL from the United States District Court for the District of Columbia.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

This case is consolidated with 87-253, *Otis R. Bowen, Secretary, Department of Health and Human Services* v. *Chan Kendrick, et al.* and 87-462, *Chan Kendrick, et al.* v. *Otis R. Bowen, Secretary of Health and Human Services, et al.* and a total of one hour is allotted for oral argument.

November 9, 1987

Supreme Court of the United States

No. 87-462

CHAN KENDRICK, ET AL., APPELLANTS

v.

OTIS R. BOWEN, SECRETARY, OF HEALTH AND HUMAN SERVICES, ET AL

APPEAL from the United States District Court for the District of Columbia.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

This case is consolidated with 87-253, *Otis R. Bowen, Secretary Department of Health and Human Services* v. *Chan Kendrick, et al.* and 87-431, *Otis R. Bowen, Secretary of Health and Human Services, et al.* v. *Chan Kendrick, et al.* and a total of one hour is allotted for oral argument.

November 9, 1987

Nos. 87-253, 87-431, 87-462, and 87-77

Supreme Court, U.S.
FILED
FEB 13 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

OTIS R. BOWEN, Secretary of Health and Human Services,
Appellant,

—v.—

CHAN KENDRICK, et al.,
Appellees.

OTIS R. BOWEN, Secretary of Health and Human Services,
Appellant,

—v.—

CHAN KENDRICK, et al.,
Appellees.

CHAN KENDRICK, et al.,
Cross-Appellants,

—v.—

OTIS R. BOWEN, Secretary of Health and Human Services,
Cross-Appellee.

UNITED FAMILIES OF AMERICA,
Appellant,

—v.—

CHAN KENDRICK, et al.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

APPELLEES' AND CROSS-APPELLANTS' BRIEF

BRUCE J. ENNIS, JR.
Ennis, Friedman & Bersoff
1200 17th Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 775-8100

JANET BENSHOOF
(Counsel of Record)
LYNN M. PALTROW
DAWN JOHNSEN
NAN D. HUNTER
RACHAEL N. PINE
American Civil Liberties Union
Foundation
132 W. 43rd Street
New York, New York 10036
(212) 944-9800

QUESTIONS PRESENTED

1. Whether the district court erred in holding that the Adolescent Family Life Act, 42 U.S.C. §§ 300z *et seq.*, which requires religious involvement in all programs, and which funds religious organizations to teach and counsel on sexuality issues, violates the Establishment Clause of the First Amendment.

2. Whether the district court erred in severing the statutory provisions that involve religious organizations in Adolescent Family Life Act programs, and in enjoining the funding of religious organizations, rather than invalidating the Adolescent Family Life Act in its entirety.

PARTIES

Defendant below, Otis R. Bowen, in his official capacity as Secretary of Health and Human Services, is Appellant herein. Defendant-Intervenors in the trial court were Sammie J. Bradley, Katherine R. Warner and United Families of America; United Families of America is Appellant-Intervenor herein. Plaintiffs below, Chan Kendrick, Reverend Robert E. Vaughn, Reverend Lawrence W. Buxton, Dr. Emmett W. Cocke, Jr., Shirley Pedler, Reverend Homer A. Goddard, Joyce Armstrong, John Roberts, and the American Jewish Congress are Appellees herein.

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Exhibit B, Adolescent Health Services and Pregnancy Prevention Care Act of 1978, Pub. L. No. 95-626, tit. VI, 92 Stat. 3551, 3595-3601 ..... 28a

Exhibit C, Framework For This Court For Cases Involving Aid To Religious Institutions Decided Under The *Lemon* "Effects" Test 40a

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Exhibit D, Proposed Order Of The Adolescent Pregnancy Prevention And Pregnancy Services Board Adopting Rules, Wis. Stat. Ann. § 46.93 (West 1987), as amended by 1987 Wis. Act 27, § 863br 42a

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INTRODUCTION

The Adolescent Family Life Act is without question a law respecting an establishment of religion. In enacting the Adolescent Family Life Act ("AFLA"), Title XX of the Public Health Service Act, 42 U.S.C. §§ 300z to 300z-10, Congress deliberately chose to fund religious instruction on sexuality. Religious organizations are called upon to participate in AFLA programs in their traditional role as transmittors of religious values. Pursuant to the Act, AFLA programs convey to young people a message—as one enthusiastic recipient of AFLA services explained it—that "the focus of sexuality [is] shifted to the total person in Christ" and that students are to "travel life's highway with God, as their copilot!" J.A. 427.

The AFLA is both intended and perceived to convey a message of government endorsement of religion and certain religious beliefs. The AFLA endorses religion by 1) requiring the involvement of religious organizations in all funded programs; 2) funding religious organizations to provide sex education and reproductive health care services in a manner that promotes theological beliefs; 3) funding only those religious groups that hold certain theological beliefs about sexuality issues, including abortion; and 4) funding programs likely to promote religion with no statutory assurances that the funds will be used for purely secular purposes.

The district court's judgment of unconstitutionality[1] rests on the overwhelming showing made by plaintiffs, rebutted by neither the government nor intervenors, that, in enacting the AFLA, Congress undertook to fund a religious crusade against adolescent "promiscuity" and abortion.[2] The court's opinion in no way threatens, as the government and intervenor contend, the ability of religious organizations to operate non-

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1 All citations to the district court's opinion will be to the Appendix of appellant's Jurisdictional Statement in the form "J.S. App. _____." Cites to the Joint Appendix are in the form "J.A. _____." Cites to other parts of the record are by the record number, in the form "R. _____." "R. 155, A., _____, _____" refers to a volume of the Appendix to plaintiffs' Statement of Material Facts.

2 The original draft AFLA bill spoke in terms of discouraging "adolescent promiscuity" and promoting "chastity." S. 1090, 97th Cong., 1st Sess. § 1901(a) (Apr. 30, 1981).

ideological and non-sectarian programs at government expense under properly limited statutes respectful of the Constitution.

Notwithstanding the elaborate and novel legal arguments made by appellants, this case requires the Court only to say what should have been too plain for argument—that under our Constitution religious instruction and indoctrination are not within the scope of Congress' power to tax and spend for the general welfare.

STATEMENT OF THE CASE

A. THE LEGISLATION

Congress passed the Adolescent Family Life Act to replace the Adolescent Health Services and Pregnancy Prevention and Care Act of 1978, Pub. L. No. 95-626, tit. VI, 92 Stat. 3551, 3595-3601 ("Title VI"). *See* S. Rep. No. 161, 97th Cong., 1st Sess. 1 (1981) ("Senate Rep."). The AFLA's sponsors were unhappy with the lack of "values"-teaching in Title VI programs and remedied this by "*promoting* the involvement of religious organizations." *See* Senate Rep. at 7, 15-16 (emphasis added). Congress specifically included religious groups in order to inject religious values and the power of religion into AFLA programs. Congress recognized that religion could do what government could not, because religion does not suffer from "the limitations of Government in dealing with a problem that has complex moral and social dimensions." *Id.* at 15-16. Moreover, this government funding of religion was intended to be highly visible; the AFLA is a demonstration project designed to create models for other programs to follow, and it is to be "promoted and publicized." *Id.* at 16.

The AFLA, in contrast to Title VI,[3] requires the involvement of religious organizations in funded programs,[4] either as direct recipients of federal funds and/or in cooperation with secular grantees, and inserts the words "religious and charitable organizations" in four separate places. §§ 300z(a)(8)(A), (B); 300z(a)(10)(C); 300z-2(a); 300z-5(a)(21)(B).[5] For example, section 601(a)(5) of Title VI stated "the problems of adolescent pregnancy and parenthood are multiple and complex and are best approached through a variety of integrated and essential services." 92 Stat. 3595. The corresponding section of the AFLA states "the problems of adolescent premarital sexual relations, pregnancy, and parenthood are multiple and complex and . . . are best approached through a variety of integrated and essential services provided to adolescents and their families by other family members, *religious* and charitable organizations, voluntary associations, and other groups . . . ." § 300z(a)(8)(A) to (B) (emphasis added).[6]

The AFLA includes two grant requirements not present in Title VI that mandate religious involvement in *all* AFLA programs. First, "[d]emonstration projects *shall* . . . make use of support systems such as other family members, friends, *religious* and charitable organizations, and voluntary associations." § 300z-2(a) (emphasis added). Second, every application for AFLA funds must include "a description of how the applicant will, as appropriate in the provision of services, involve *religious* and charitable organizations, voluntary associations, and other groups. . . ." § 300z-5(a)(21)(B) (emphasis added).[7] Moreover, unlike other federal statutes contemplating aid to religious institutions, the AFLA contains no provision to ensure that funds will be used only for secular purposes.

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3 The AFLA is attached hereto as Appendix A; its predecessor statute "Title VI" is attached hereto as Appendix B.

4 Appellants have pointed to no other federal statute that expressly *requires* the involvement of religious organizations as such in its funded programs.

5 As the district court found: "The legislative history of these provisions shows without doubt that Congress intended religious organizations to participate in these programs as grantees and as paid or unpaid participants in grants awarded to other organizations." J.S. App. 28a. Moreover, the court recognized that "Title VI was amended to permit religious organizations to be involved in AFLA programs." J.S. App. 22a.

6 The AFLA also includes a new provision stating that government services under the Act "should *emphasize* the provision of support by other family members, *religious* and charitable organizations, voluntary associations, and other groups . . . ." § 300z(a)(10)(C) (emphasis added). *Compare* Title VI, § 601(a)(7), 92 Stat. 3595.

7 The "as appropriate" language was not intended to make involvement of religious groups optional; grantees do not have a choice about whether to involve religious organizations. Rather, it affords discretion to grantees to decide *how* to use religious guidance. This section was interpreted as being a mandatory grant requirement both by the district court, J.S. App.

The AFLA also differs from Title VI by making instruction and indoctrination of certain values concerning sexuality a major component of the Act. § 300z-1(a)(8).[8] Seven of the seventeen listed AFLA care and prevention services explicitly involve education and counseling, and two involve activities intimately related to education and counseling—outreach and planning services. J.S. App. 5a. In fact, with the exception of pregnancy testing, child care and transportation services, all of the AFLA care and prevention services involve some form of teaching, referral, or counseling services. *See* § 300z-1(a)(4).

Finally, the AFLA seeks "to encourage adolescents to bring their babies to term," Senate Rep. at 20, and to promote adoption, while discouraging abortion. The AFLA imposes the following abortion restriction on all grantees:

> Grants or payments may be made only to programs or projects which do not provide abortions or abortion counseling or referral, or which do not subcontract with or make any payment to any person who provides abortions or abortion counseling or referral, except that any such program or project may provide referral for abortion counseling to a pregnant adolescent if such adolescent and the parents or guardians of such adolescent request such referral; *and grants may be made only to projects or programs which do not advocate, promote, or encourage abortion.*

§ 300z-10(a) (emphasis added).[9]

40a, and by Congress in its 1984 reauthorization of the AFLA, *see* S. Rep. No. 496, 98th Cong., 2d Sess. 9-10 (1984).

8 Under Title VI there was no separate funding for "prevention services," which under the AFLA include educational programs "to prevent adolescent sexual relations," § 300z-1(a)(8) and the Title VI programs contained no content restrictions.

9 Contrary to the district court's interpretation, J.S. App. 14a-15a, the legislative history of the abortion prohibition makes clear that Congress intended both to restrict abortion speech in AFLA programs and to impose eligibility restrictions on organizations that can be construed as "promoting" abortion even with private funds. *See* Senate Rep. at 20; S. 1090, 97th Cong., 1st Sess. § 1911 (June 24, 1981) (R. 185, Supp. A., 124-25) (draft preceding one adopted); H.R. Conf. Rep. No. 208, 97th Cong., 1st Sess. 816-17 (1981), *reprinted in* 1981 U.S. Code Cong. & Admin. News 1010, 1178-79. In contrast to the AFLA restrictions, Title VI required counseling and referrals on all pregnancy options, including abortion. § 601(a)(22), 92 Stat. 3600. Finally, the AFLA added the requirement of parental notification and consent for minors requesting specified services, except if it is believed that the parents are attempting to compel the minor to have an abortion. § 300z-5(22).

B. THIS LAWSUIT

This action seeking declaratory and injunctive relief was filed on October 26, 1983 in the United States District Court for the District of Columbia, challenging the constitutionality of the AFLA on the grounds that it violated the religion clauses of the Constitution. Plaintiffs include federal taxpayers, four Protestant ministers and the American Jewish Congress.[10]

Plaintiffs do not disagree with the government's description of the proceedings in this case. The government, however, mischaracterizes the district court's opinion on the cross motions for summary judgment, so it is necessary to restate briefly its holdings.

The district court applied the now well-settled three-part test for Establishment Clause violations. *See Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971). The court found that the AFLA has a valid secular purpose[11] and thus satisfied the first *Lemon* prong. The court held that the AFLA failed the second, "primary effect," prong of the *Lemon* test because its use of religious organizations for indoctrination was clear from the face of the Act, and the AFLA has "the direct and immediate effect of advancing religion." J.S. App. 23a (quoting *Committee for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S.

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10 The religious plaintiffs alleged injury not only as taxpayers but also to their religious ministries: Because of their denominations' theological positions on abortion, they are not eligible for AFLA grants, yet religious organizations with beliefs antithetical to theirs receive AFLA funds which enable them to promote their beliefs. The American Jewish Congress sued on behalf of its members. R. 6.

11 In so holding, however, the court noted that under prior precedent, a statute satisfies the purpose prong as long as it has "some" valid secular purpose, "[e]ven when the benefits to religion are substantial, and motivation to advance or benefit religion is apparent." J.S. App. 17a. The court emphasized three times that although the AFLA met this test, it did so because it was not "motivated *wholly* by religious considerations." J.S. App. 20a, 21a, 22a (emphasis in original).

756, 783 n.39 (1973)). The court buttressed this conclusion by applying three factors referred to by this Court as independent indicia of "primary effect," *see* J.S. App. 25a-27a, and found that the AFLA failed each one of these tests.

First, by involving religious organizations in the value-laden enterprise of discouraging premarital sex and abortion, "the AFLA contemplates subsidizing a fundamental religious mission of those organizations." *Id.* at 30a. Second, "the statutory scheme is fraught with the possibility that religious beliefs might infuse instruction and never be detected by the impressionable and unlearned adolescent to whom the instruction is directed." *Id.* at 30a-31a. Finally, "the involvement of religious organizations in counseling and education on premarital sex, abstinence, and the preferability of adoption to abortion creates a 'crucial symbolic link' between government and religion when the counseling is funded by the public fisc." *Id.* at 31a. The court reached "the inescapable conclusion . . . that federal funds have been used by pervasively sectarian institutions to teach matters inherently tied to religion." *Id.* at 36a.

The court held that the AFLA fosters excessive entanglement due to the sectarian character and purpose of the religious grantees, *id.* at 40a, the "great" potential that AFLA-funded religious organizations would further religion when counseling teenagers, *id.* at 41a, and the fact that ensuring that religion is not promoted "would require extensive and continuous monitoring and direct oversight of every counseling session." *Id.* The court concluded that "it is impossible to comprehend entanglement more extensive and continuous than that necessitated by the AFLA." *Id.* at 42a.[12]

C. FACTS

1. Introduction.

The district court relied on the "undisputed record" which "transform[ed] the inherent conflicts between the AFLA and

12 The court also found that the AFLA is likely to incite political division along religious lines because it addresses issues that are of fundamental importance to religions and about which religions disagree along denominational lines. J.S. App. 43a.

the Constitution into reality." J.S. App. 32a, 38a.[13] The court "carefully and exhaustively" considered "the golconda of documents submitted," *id.* at 7a, which "reveal[ed] the extent to which the AFLA has in fact 'directly and immediately' advanced religion, funded 'pervasively sectarian' institutions, and permitted the use of federal tax dollars for education and counseling that amounts to the teaching of religion." *Id.* at 33a.

2. HHS Interpreted The Statute To Require Religious Involvement By All Grantees.

a. Fulfilling The AFLA's Purpose, HHS Injected Religious Bias Into The Grant-Making Process.

In 1982, the first AFLA grant cycle, Marjorie Mecklenburg, the Director of the Office of Adolescent Pregnancy Programs ("OAPP"), selected external field readers to evaluate 405 applications. R. 107, Ex. 7. The director of program development and monitoring for OAPP, Patrick Sheeran, who had extensive experience supervising adolescent grant programs, R. 55, 10-30, testified that he was surprised by the readers who were selected solely by Mecklenburg, both by their lack of

13 The court's reliance on plaintiff's facts was based on the thoroughness of their papers and defendant's admissions:

> [Plaintiffs'] "Statement of Undisputed Material Facts" . . . quoted extensively from the exceptionally large record in this case and cited to the exact place in the record where each quotation could be found. . . . Most of defendant's "disputes" of plaintiffs' facts were unsupported disagreements, complaints that a quote had been taken out of context, or the word "dispute" with a reference to the page in the multi-volume record at which the Court could look up an undescribed disagreement and decide for itself whether the effort was worthwhile. Defendant also "controverts" some of plaintiffs' facts with "declarations to be supplied later." The Court knows of no such later-filed declarations . . . . [S]uch a "response" does not comport with the command of Local Rule 108-h . . . . [The Court] regards as "disputed" all facts pointed to by plaintiff and disputed on the basis of identified evidence in the record that actually makes the point claimed by defendant. As Rule 108-h requires, the Court takes as uncontroverted all other facts pointed to by plaintiffs.

J.S. App. 32a n.14. Of the 1251 facts submitted by the plaintiffs, 1215 or 97.8% of these were uncontroverted. J.A. 619-23.

experience and by the high proportion with religious affiliation (30 or 40 percent).[14] J.A. 98.

The readers' evaluations make clear that they understood that the legislation was intended to *require* religious indoctrination to achieve the legislated goals and to that end requires the involvement of religious organizations.[15] OAPP summaries of the evaluations sent to rejected applicants indicate that the requirement of religious involvement was so central to the Act that the absence of evidence of such involvement was a basis for rejection.[16]

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14 Intervenor's claim that government officials selected grantees without regard to religious affiliation and ranked them by objective criteria is unsupported. Int. Br. 28. *See infra* pp. 31, 51 & n.107, 52.

15 Readers commented that: "the involvement of religious organizations suggests an understanding of the purpose of the demo. program." R. 155, A., I, 345 (Crow Wing County Board of Health). "I fail to see any involvement of clergy and religious leaders. . . ." R. 111, 333 (Cooperative Education Service Agency). "There is missing a decided pro-life commitment in this proposal . . . . Lacking is the kind of counseling that you get in Catholic Social Service for example." J.A. 509 (Baltimore City). "*A major weakness* in the prevention aspect is no board of community ministerial (psycho-spiritual) value experts are involved as a major hand in values curriculum development or teaching." R. 155, A., I, 342 (emphasis in original) (Department of Health and Human Services, New Orleans). One reader scored an application low because: "No experts on transcendental (the most effective) Judeo-Christian values is represented in the development or teaching of this proposal." A consultant hired by OAPP to evaluate the grant making process asked Ernest Peterson, "What would happen if the ACLU got hold of that comment!" J.A. 511. Comments also included: "The . . . unique aspect of this approach . . . is predicated on the idea that teen pregnancy occurs because teens lack, among other things, spiritual and cultural values . . ." R. 155, A., I, 355 (University of Pittsburgh School of Social Work). Under "Strengths" reviewers wrote: "Involvement of religious/charitable organizations clearly indicated." *Id.* at 329 (Rutgers State University/Regl. Health Programs). "The pastoral training is very, very good involving the religious. . . ." *Id.* at 354 (Kankakeeland Community Action Program).

16 Rejected applicants were told that they had not received funding because: their programs promised "no involvement of religious groups," R. 155, A., 1-A, 505D (Lake Cumberland District Health Department); "[t]here is no evidence that local churches or pastoral help and training will be used," *id.* at 505E (Junior Education of Tomorrow); "[t]here was no discussion of the development of moral or spiritual values as a part of the program," *id.* at 505G (San Diego University Foundation); "[d]escriptions of relationships with community and religious organizations should have been expanded," *id.* at 505K (University of Pittsburgh School of Medicine); "[t]his appears to be the same type of prevention program that has been advocated and practiced by Planned Parenthood for many years. . . . We need . . . those who advocate a more spiritual and moral approach to these teeners," R. 155, A., I, 340 (Arkansas Coordinated Child Effort); "[n]o evidence of use of local family-values experts such as pastors or Christian ed. directors in local churches where teaching could be ongoing," *id.* at 346 (Texas Agricultural Extension Service). *See also* R. 155, A., 1-A, 505B, 505F, 505I, 505J.

b. HHS Funding Decisions Ensured That Religions And Religious Viewpoints Would Be Advanced.

In 1982, out of fifty-nine "care," "prevention" or "combination" grants, nine primary grantees were religiously affiliated organizations, all with Christian theologies. J.A. 683-85, 689, 748-54; R. 155, A., IV, 158, 160.[17] In 1983 all nine were refunded and two religious organizations were added, Families of the Americas Foundation, Inc. ("FAF") and Search Institute. J.A. 748-54; *see also* J.S. App. 34a-36a.[18]

It was clear from the face of the grant proposals that AFLA grants for 1982 and 1983—and 1987[19]—would be used to fund religious organizations, provide religious materials in order to

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17 Seven were Catholic, one Church of the Latter Day Saints, and one Missouri-Synod Lutheran. J.A. 689.

18 The district court found that "at *least* ten AFLA grantees or subgrantees were themselves 'religious organizations' in the sense that they have explicit corporate ties to a particular religious faith and by-laws or policies that prohibit any deviation from religious doctrine." J.S. App. 34a-35a (emphasis added). Using FAF as an example, the court also stated "[t]he religious character of other AFLA grantees or subgrantees is not as explicit but is nonetheless indisputable." *Id.* at 35a.

19 Because of the five year cap on grant awards, § 300z-4(c)(1), the 1987 grantees are not the same as those subject to discovery in this case. However, information from this record alone reveals the likely religious nature of at least two current grantees. One 1987 grantee, the Archdiocese of Washington, also applied in 1982. A reader's comment at that time was: "The program objectives and benefits are to teach positive sex education along with Christian values of life and family, and to include parents/adults in this catechetical approach. . . ." R. 155, A., I, 320 F.

Materials with explicit religious references from another 1987 grantee, Community of Caring, were included with 1982-1986 grantee Catholic Family Services of Amarillo. *See* R. 155, A., IV, 90-101; *see also* R. 181, Watson Decl. ¶ 22A.

promote religious viewpoints, build AFLA programs on existing religious programs, and provide programs in churches and parochial schools. The district court found that the "programs in operation" did not solve "the First Amendment problems evident from these approved grant applications." J.S. App. at 36a.

i. OAPP Funded Secular Grantees To Use Religious Means To Achieve AFLA Goals.

Secular grantees under the AFLA envisioned their role as helping churches to promote more effectively their religious tenets on sexuality. The grant application for the Southeast Missouri Association of Public Health Administrators, Inc. ("SeMo") states:

> One of the most obvious tools which can be used to change the attitude of young people toward sexual activity . . . is the use of the religious foundation as a support for sexuality education. Most major religions see sexuality as being of God and can therefore . . . help young people to learn about their bodies and the values that relate to sexual functioning in a context that is consistent with the tenants [sic] of their particular faith.

J.A. 562. SeMo was funded to aid churches "in achieving *their* stated goals," R. 155, A., IV, 131-32 (emphasis in original), and to help "families and churches to communicate [their] values more effectively."[20] *Id.* at 134. Further, SeMo felt its "success in delivering sexuality education through fundamentalist churches, if continued, could result in [its] becoming a model program for this type of delivery mechanism." *Id.* at 141.[21]

20 In its 1983 continuation application, SeMo predicted a "substantial increase in the level of participation by church and religious organizations . . . primarily from the fundamentalist religions." R. 155 A., IV, 156. From January 1 through September 30, 1983, 43% of the people receiving informational presentations did so through groups with a religious affiliation. *Id.* at 151.

21 SeMo's director sent OAPP a speech about SeMo's work, stating that "the church can do your job better, cheaper and with more continuity. . . . In our program we contact churches through individuals . . . and let them do the selling."

In keeping with the statutory commands, secular grantees used religious institutions as vehicles to promote the AFLA's goals. For example, the Charles Henderson Child Health Center's ("CHCHC") prevention program was based on the view that "there [is] only one mechanism through which the families may become a part of our effort, *that being the church*," J.A. 577 (emphasis in original), and explained that its program would "never contradict [that] which is taught at home or in church, but it should act as a support for these institutions . . . ." R. 155, A., IV, 404. CHCHC used its AFLA funds to promote "Family Week" culminating in "Family Sunday" which encouraged pastors to promote Christian views on the family and "commitment to their moral standards." *Id.* at 403.[22]

Memorial General Hospital Association in West Virginia was funded for a program which included plans to contact religious groups and seek input from the local religious community so as to support the development of teenagers' "own [religious] values." *Id.* at 291. After being funded it reported:

> Our contacts with the local religious community enables us to support our clients in the development of their own values and, if appropriate, to cooperate with these groups or members of the clergy. One YHS [Youth Health Services] staff member has even served as a co-therapist with an area minister. We will continue to involve religiously oriented groups and individuals in our programs at YHS.

Id.[23] A standard workshop session utilized a minister-leader and was designed to answer questions such as: "what are *our*

22 OAPP officer Barbara Rosengard was aware that as part of the AFLA programs CHCHC arranged for family day with "sermons in various churches." R. 74, 126.

23 Workshops were conducted in church facilities for both students and "Christian Education Teachers." R. 155, A., IV, 294-98. Another program, the Guidance Center, put on family life education classes in conjunction with religious leaders. Two classes were held in religious schools in the classrooms for the school children. Sessions with ministers were held to encourage their support for and involvement with AFLA programs for their congregations. *Id.* at 413-14.

values as *Christians*," and "what values are presented in the Ten Commandments." *Id.* at 292 (emphasis added). Many other secular grantees promoted religion, aided religious institutions or combined forces with sectarian groups to further sectarian goals.[24]

ii. AFLA Programs With A Distinctly Religious Slant Were Presented To Public School Students.

The School of Public Health of the University of South Carolina, sponsored a public high school play submitted to OAPP in which the script calls for student actors to assert that "*the Church* never has, does not now, and will never approve of abortion." *Id.* at 424, 425, 430 (emphasis added). The peer counselors who wrote the play and the students who saw it were taught that "the Church" is a monolithic structure with one view of abortion.

Search Institute's grant to promote a sex education curriculum in public schools and churches, *id.* at 16, was designed with "an emphasis on family, *church* and community involvement," *id.* at 17, (emphasis added), and was to "*build on* the work Rev. John Forliti of the Search Institute staff has done in developing a value-based sex education model for the Roman Catholic Church[,] [t]itled 'Reverence for Life and Family: A Catechesis in Sexuality.' " J.A. 433; J.A. 115[25] (emphasis added). OAPP staff knew that this program was used by Archdioceses, parishes and Catholic schools and admitted that a class using this manual could discriminate against Jews. J.A. 115-16; R. 125, 54, 122-25.[26]

iii. OAPP Funded Grantees To Build Upon Existing Religious Programs.

Some grantees had pre-existing religious programs. St. Ann's, a home for unmarried pregnant teenagers, operated by the Order of the Daughters of Charity and owned by the Archdiocese of Washington, R. 155, A., III-A, 512, subcontracted with the "Center For Life" at Providence Hospital. The Center was chosen to provide the mandatory educational component because it would do so in accordance with the teachings of the Catholic Church. J.A. 286-87; R. 155, A., III-A, 512, 516. The Center's AFLA program, "Pathways," consists of classes for pregnant teens in fertility awareness,

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24 The Maternal and Child Health Program in Hawaii was funded to provide "church and counseling based efforts at reaching families," plan "seminars for professional church staff and church volunteers" and encourage churches "to offer their unique lesson materials on teen sexuality and family involvement." J.A. 579 (emphasis added). Lyon County Health Department's grant proposal noted that "[s]uch sensitive and intimate [sex education] material *cannot* be presented without touching on . . . religious beliefs." R. 155, A., IV, 221. Lyon County held classes at several churches and parochial schools. *Id.* at 230, 238. Tucson Unified School District No. 1 described how subcontractee St. Elizabeth's would distribute a film to "help[ ] boys and girls understand their roles and live their lives as Christians." *Id.* at 289. Community Health Clinics in Nampa, Idaho applied for a grant to expand an existing program which one minister's support letter noted would "help motivate and facilitate [the churches] in doing what we need to be doing." *Id.* at 329. Hill Health Corporation organized a network including two churches and a Catholic social services agency to provide a "homeostatic balance by which parents and their children grow and interact, learning from each other, in a manner that is culturally and socially acceptable to the community, i.e., *the church*, the schools and other institutions the family comes in contact with." *Id.* at 392-94 (emphasis added). Hill Health makes religious practices one of the measures of family togetherness: "poor family togetherness" is indicated where "religious practices are absent." *Id.* at 397.

25 The brochure for the book explains that it has as its goal " 'training in chastity in accord with the teaching of Christ and the Church.' " R. 155, A., IV, 31. Rev. Forliti, who applied as the proposed AFLA project director, *id.* at 14, 23, wrote the program as part of his responsibilities as Director of Religious Education for the Archdiocese of St. Paul. R. 125, 53.

26 Brigham Young University ("BYU") was funded for development of a public school sex education curriculum which had as the project director a former Bishop of the Mormon Church and a current faculty member in the family life department at BYU. Religion courses are required at BYU, faculty members are required to adhere to the principles of the Mormon Church, and the expressed philosophy about education is one that combines secular and religious teachings: "It has always been the view of The Church of Jesus Christ of Latter-Day Saints that education is not complete without proper integration of secular and religious knowledge and values. Understanding and skill are important attainments in life and will better serve the individual when accompanied by religious convictions, attitudes and standards of behavior." R. 155, A., VI, 202-03; *see also* J.A. 616-17.

contraception,[27] intimacy[28] and natural family planning. Pathways was taught by the same employees, using the same religious materials,[29] as the pre-existing and still continuing "Rainbow" program developed by the Center for Catholic schools.[30] Girls at grantee St. Ann's are instructed on the "Christian tradition" of marriage. J.A. 344. That St. Ann's provides religious instruction is not surprising because it "functions according to Christian principles as taught by the Catholic Church." R. 93, Ex. 2; *see also* J.A. 314-15.[31]

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27 The original grant application stated that the family life component would "present information both on the advantages and the medical hazards of common contraceptive methods." However, St. Ann's submitted a revised version to HHS stating it would only "present information on the medical hazards of common contraception methods," J.A. 294-96, because the assistant administrator of St. Ann's wanted the grant proposal to reflect more "accurately" the thrust of the classes. J.A. 316-17; *see also* J.A. 288-91. Biased information on contraception consistent with the church's teachings was in fact presented. J.A. 299-300, 337, 350-53, 360-61, 363-64.

28 The "spiritual" facets of intimacy include "meaning of life for both partners, relationship to universe and God." R. 59, Ex. 4, at 5.

29 At St. Ann's, books that contain Catholic doctrine on chastity, masturbation, homosexuality and abortion, bought and paid for by the AFLA, were distributed to participants. *See* J.A. 336, 354-59, 362. After discovery in the lawsuit, HHS wrote St. Ann's and asked that two religious books, McGoey, *Sex, Love and the Believing Girl* and Knight, *The Good News About Sex*, not be used. J.A. 674. HHS, however, made no effort to prevent St. Ann's from distributing the other religious books that were used in the program, including McGoey, *Sex, Love, and the Believing Boy*, R. 59, Ex. 20, and Espinosa, *Birth Control, Why Are They Lying to Women?*, which states, for example: "The gentleness with which we should approach human life has transcendental roots: 'To me you shall be sacred; for I the Lord am sacred.' (Lev. 20:26). To work in the pro-life movement you should, in a way, 'Take off your shoes, because the ground on which you are walking is holy.' (Ex. 3:5)" J.A. 365.

30 The Rainbow brochure states it "provides . . . a more Christian, pro-life education in sexuality than that available in the public sector." J.A. 370.

31 St. Ann's progress report stated: "Our philosophical orientation is that sexuality [i]s a God-given gift to be used with reverence. . . ." J.A. 376. It mentions God two additional times and ends by asking: "How is the work we are doing in this project different because we believe in Jesus Christ?" J.A. 377.

Families of the Americas Foundation ("FAF"), formerly World Organization Ovulation Method-Billings ("WOOMB"), U.S.A. is a Catholic organization whose "broad purpose" is to "disseminat[e] accurate information about the Billings Ovulation Method," ("BOM") a method of natural family planning.[32] FAF viewed the AFLA as an opportunity to expand its existing Christian sexuality program "based on the teachings of the Catholic Church;" its application proposes goals identical to that of the existing program. J.A. 379-80, 387, 390. The application makes clear that BOM "[i]s not only a method of birth regulation but also a philosophy of pro-creation . . . ," and OAPP staff members were aware that this meant teaching a religious philosophy. J.A. 141-43. One of the funded grant activities entailed "providing continuous communication on all of our national and international activities with the newly founded 'Pontifical Council for the Family' at the Vatican." J.A. 168.

Catholic Charities of the Diocese of Arlington ("CCDA") was funded to provide an educational program solely for Catholic schools or religious classes in Catholic parishes. J.A. 211-12.[33] Recruitment was done through pastors or directors of religious education, R. 80, 82-84; R. 75, 53-55, 85-86,[34] and the

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32 The district court found:

> Family of the Americas Foundation ("FAF"), for instance, is an affiliate of "WOOMB-International," an organization without discernable [sic] religious ties. But WOOMB's "Aims and Objectives" states that the organization was "inspired by the Encyclical *Humane Vitae*," the papel [sic] encyclical setting forth Catholic dogma on birth control and abortion.

J.S. App. 35a; *see also* R. 155, A., V, 41. In a letter to the President of the Pontifical Council for the Family, Mercedes Wilson described her organization as "a lay organization, strongly committed to the implementation of the teachings of the *Humanae Vitae* and *Familiaris Consortio*." J.A. 627. One FAF brochure states that the BOM is the "Christian Alternative," R. 230, Ex. 1, and FAF's letterhead states: FAF, Inc., WOOMB, USA, "*The Christian Alternative*." J.A. 629 (emphasis added).

33 *See also* R. 80, 23-25; J.A. 222-23.

34 Similarly, the grant application of Catholic Social Services of Wayne County (CSS) indicated that recruitment for its prevention program was to be centered on churches, the Catholic Youth Organization, parochial schools and public schools. R. 155, A., IV, 364.

only "manuals" listed as reference sources for the program were explicitly religious. R. 155, A., III, 46. Every AFLA presentation of the CCDA included a lecture on the church's teachings by a priest. R. 75, 75-76; R. 79, 17, 20-22; R. 80, 67-68, 91-92, 223. In some instances attempts were made to give the appearance that the religious lecture was separate but as the district court found:

> [S]ome grantees . . . establish[ed] programs in which an AFLA-funded staffer's presentations would be immediately followed, in the same room and in the staffer's presence, by a program presented by a member of a religious order and dedicated to presentation of religious views on the subject covered by the AFLA staffer. This transparent attempt to isolate the sectarian from the secular is unconvincing . . . .

J.S. App. 37a (citations omitted).[35]

Catholic Family Services of Amarillo, Texas ("CFS"), like CCDA, identified itself as part of the Catholic Church with the "Bishop retain[ing] authority" over CFS "where basic doctrine is at issue." R. 181, Watson Decl. ¶ 2. Like CCDA, CFS proposed to use AFLA funds to expand sex education programs "through the parish social ministry." R. 155, A., IV, 83.[36] From the beginning of funding in May 1984, CFS held twenty-one prevention programs in churches, parochial schools and Catholic family services; only three programs were held in non-sectarian settings. R. 181, Watson Decl. ¶ 11. Its continuation application explained: "What has seemed most feasible has been to contact church groups and have them *sponsor* such sessions *for* church members with an invitation to the general public." *Id.* at 86 (emphasis added). CFS used a curriculum outline guide for the AFLA parent workshops with explicit theological references, *see id.* at 101B; R. 181, Watson Decl.

35 A secular grantee, Northwest Louisiana Health Department, also sponsored AFLA workshops at churches which were accompanied by religious presentations about sex. J.A. 568, R. 155, A., IV, 197-204.

36 The care component proposed pregnancy counseling where caseworkers would discuss "the detrimental effects" of abortions, as well as "the destruction occurring to an unborn infant," although an effort would be made not to put "heavy" guilt feelings on the teenager. J.A. 513.

¶ 22D, as well as religious materials as "reference" materials, *see* R. 155, A., IV, 90-101, 103-106.[37]

The district court found that St. Margaret's Hospital is "a self-described 'Christian institution' committed to acting 'in harmony with the teaching of the Catholic Church.' " J.S. App. 33a.[38] Out of the one hundred institutions named in St. Margaret's grant application to receive AFLA education courses, ninety-six were Catholic schools, churches or parish religious educational programs. R. 155, A., II, 38-42. *See also* J.A. 554; R. 229, Ex. 3. The grant expanded St. Margaret's program, which is based on the premise that family breakdown is due to "secularism," and "widespread ignorance" "of the ideal of holiness inherent in the basic tenents [sic] of Judeo-Christian beliefs." J.A. 515. Its stated objective was to emphasize the "pastoral intervention of the church," because "[s]piritual guidance is essential to maintain spiritual purity." *Id.*

37 Materials with "strong religious emphasis" were given to some participants although the explicit references to scripture and other theological orientation were deleted. R. 181, Watson Decl. ¶ 22. CFS admitted using the film "Everyday Miracle," which they describe as "depicting the miracle of the process of human reproduction as a gift from God." R. 155, A., IV, 119; R. 181, Watson Decl. ¶ 22E. The study guide for another film, attached to their continuation application, included "suggested Scripture readings" and a section called "Theological Orientation." J.A. 559.

38 Grantee Good Samaritan Hospital, also a "Catholic sponsored health care facility," R. 155, A., IV, 158, was funded, as the district court found, to provide "spiritual counseling." J.S. App. 36a; R. 155, A., IV, 181. Intervenor criticizes this court's finding stating: "[w]hat the court did not point out is that the proposal for spiritual counseling was *rejected* by the secretary as '*not legally permissible*.' " Int. Br. 42. This statement, like others characterizing the facts, distorts the record. Over a year-and-a-half after SUMA was *funded*, an OAPP staff member wrote a letter stating:

> In one of the documents you provided us, there was a reference to spiritual counseling services provided by the Inter-Parish Ministry. If this is part of your project, it is *not legally permissible* in a federally funded project and you should revise the project accordingly.

J.A. 676 (emphasis in original). Obviously HHS did not even know what its grantee was doing, gave no specific guidelines for revising the program, and offered no evidence that any steps were ever taken beyond this letter to ensure that the religious aspects of the program—only one of many—were discontinued. *See* R. 155, A., IV, 159, 169.

c. OAPP Condoned The Promotion Of Religious Doctrine.

For a year-and-a-half, St. Margaret's AFLA program used AFLA funds to teach an explicitly Catholic curriculum with references to God, Christ and Christian tenets in over ninety parochial schools in Boston. J.S. App. 36a, 37a; J.A. 417-26; R. 231, 95-104.[39] After this obvious constitutional violation could no longer be ignored, HHS nevertheless allowed the same teachers to use the "same" curriculum tailored to Catholic theology in the public schools with only the explicit references to "God" or religion removed, J.A. 404, 410, 413, 416; R. 231, 157,[40] and re-funded St. Margaret's for three more years, J.A. 754.

Despite the references in many grant applications to religion, presentations in churches and involvement of clergy, no meaningful investigation was undertaken by HHS before awarding the grants. J.A. 158-59. One grantee, CCDA, was even viewed by Sheeran and an HHS attorney-consultant as nothing more than a "glorified Confraternity of Christian Doctrine program." J.A. 109-11. The only HHS response was to order Sheeran to call only the Catholic grantees which had already been selected for funding but before the official award. J.A.

39 The St. Margaret's tenth-twelfth grade curriculum instructs that: "The Church condemns . . . contraception . . . [b]ecause it deliberately frustrates the natural power of conjugal acts to generate life, is a grave sin and is intrinsically evil. (Pius XI—Casti Connubii)." J.A. 423.

40 On April 16, 1984 Mecklenburg wrote Sister Natwin at St. Margaret's Hospital that due to this lawsuit the religious curriculum could not be used with AFLA monies because to do so makes "Federal funds . . . *susceptible* to being used to advance particular teachings of the Catholic Church." J.A. 518 (emphasis added). Four months later St. Margaret's responded by stating that it was "*currently* able to provide expanded program services in public school settings such that the federal funds will be utilized solely in the public school settings." J.A. 520 (emphasis added). The public school and private school curriculums were seen by the education director as the "same curriculums." J.A. 411; *see also* J.A. 401, 402. Health educators who teach in the AFLA program were trained with both curriculums simultaneously. J.A. 411. Although the public school curriculum does not contain the sections *entitled* "The Church's teachings," the curriculums were otherwise identical including stressing the preferability of "natural" contraception, the immorality of abortion, and the abortifacient qualities of the IUD. R. 155, A., II, 477-92.

106-107, 160-61. The officer obtained assurances that they would not use AFLA money for "teaching religious classes." J.A. 107. No specific inquiry was made about the use of church and parochial school facilities, reliance on religious literature, or the effect on the programs of the grantees' religious missions. The calls lasted two or three minutes. J.A. 112-13.

Director Mecklenburg viewed the "involvement of churches" as consistent with the "intent" of the programs called for under the AFLA. J.A. 71-72.

d. Grantees' Activities Were Governed By Religious Requirements.

Because some grantees are governed by religious dictates, the services and information teenagers receive are far more restrictive than required by the statute.[41] And, whether abiding by these statutory restrictions or going beyond them, grantees viewed their reasons for promoting abstinence[42] and adoption over abortion as religious and not statutory or secular.

AFLA grantees *may* provide *referral* for abortion counseling to a pregnant adolescent upon the parent's request. § 300z-10(a) (emphasis added). Nevertheless, solely because of religious dictates many AFLA grantees will not refer teenagers for abortion even if requested to do so by the adolescent and her parents. St. Ann's refusal to provide abortion counseling even if requested was inconsistent with the AFLA and, as found by the district court, was intended instead to conform to the

41 Their religious missions do not merely "coincide[ ] with the purposes of the governmental program," Int. Br. 7, they far exceed them.

42 For example, at St. Ann's "premarital abstinence" was not taught as a secular value but rather as a religious one. St. Ann's course outline refers to II Samuel 13 of the Old Testament in substantiation of the principle that sex outside of marriage may involve the "danger of egotistic reasons" for intercourse. J.A. 347. Another AFLA purpose is to prevent *adolescent* sexuality and adolescent pregnancy. § 300z(a)(10)(A). Nevertheless, grantees for religious reasons teach that premarital sexuality at any age is wrong. *See* R. 155, A., III-A, 492-93, 517.

religious philosophy of the Catholic Church that abortion is a sin.[43] J.S. App. 34a; R. 155, A., III-A, 475-76.[44]

Although projects may not provide family planning services "unless appropriate family planning services are not otherwise available in the community," § 300z-3(b)(1), there are no statutory restrictions on counseling and referral services and no limits on the kinds of family planning that can be discussed. Nevertheless, solely because of religious dictates, some AFLA grantees only teach and refer for natural family planning ("NPP") which "has never been used successfully with teenagers," J.A. 535. For religious reasons, St. Ann's, J.S. App. 33a-35a, St. Margaret's and FAF[45] will not refer program participants for contraceptives and because CFS "is Catholic, no contraceptive devices or birth control pills will be offered." R. 155, A., IV, 126.

All Catholic hospitals and health facilities are required to follow the *Ethical and Religious Directives for Catholic Health Facilities* ("*Religious Directives*") which govern the delivery of medical care, largely in the area of reproductive health. J.A. 526, 540-44.[46] Thus, although Catholic hospitals do not generally practice medicine in a sectarian way, their obstetrical and

43 St. Ann's Employee Handbook requires the hospital to function "according to Christian principles as taught by the Catholic Church." R. 155, A., III-A, 475.

44 Similarly, employees of Catholic Charities of Arlington were prohibited from taking any "action inconsistent with Catholic doctrine, such as recommend[ing] abortions for clients." R. 181, West Decl. ¶ 4. And employees at St. Margaret's may not make referrals for abortion because it would not be "in accordance with teachings of the Catholic Church." J.A. 408.

45 Offering methods of contraception other than NFP is not allowed at St. Margaret's "[b]ecause it is in conflict with the teachings of the Catholic Church." J.A. 407. The director of FAF has stated: "Because of our religious beliefs, we cannot provide nor refer couples to programs that offer artificial methods of birth control, sterilization and abortion." J.A. 628.

46 The *Directives* state: "*Any* facility identified as Catholic assumes with this identification the responsibility to reflect in its policies and practices the moral teachings of the Church, under the guidance of the local bishop. . . . The Catholic-sponsored health facility . . . further, carr[ies] an overriding responsibility in conscience to prohibit those procedures which are morally and spiritually harmful." J.A. 541 (emphasis added).

gynecological units do.[47] Religiously imposed restrictions on abortion and sterilization interfere with the secular practice of medicine, which results in harm to the patients. J.A. 543-44, 546.

All medical personnel are required to comply with the *Religious Directives* regardless of their own personal and professional opinions. J.A. 526; J.S. App. 33a-34a. Both a physician and a nurse who worked at St. Margaret's believe that the obstetrical and gynecological care given at the hospital "is dictated by Catholic religious directives which are often counter to the patients' best medical interests, the current standard of medical care as practiced in secular institutions, and medical ethics." J.A. 525, 549-50.[48] Because of these requirements, physicians are unable to give their patients full informed consent and are prohibited "from performing, prescribing, recommending or even referring for sterilization, abortion or contraception." J.A. 527, 550. Medical personnel are "required to treat the embryo as a person from the moment of conception regardless of whether this belief is shared by the woman." J.A. 527 (citation omitted).[49] Consequently, women are forced to endure greater risks to their health, not as a result

47 Under the AFLA even secular grantees involved religion in their care services. For example, Lyon County Health Department stated that under its "care" component, "[s]piritual counseling will be promoted" and "[e]ach pregnant adolescent and her family will be urged to make one formal contact with a church minister." R. 155, A., IV, 226.

48 Dr. Louis Laz and Nurse Kim Maisenbacher each submitted affidavits. The Duncan Affidavit submitted by HHS, J.A. 677-80, does not refute these affidavits. While Dr. Duncan, Medical Director at St. Margaret's, disputes how harmful the effect of the religious guidelines are, he admits that the care given is "within the guidance of the religious directives." J.A. 678.

49 Dr. Laz explained,

> Patients are never told prior to accepting care at St. Margaret's that regardless of their personal choice or health needs, they will never receive these procedures, or referrals, or be counseled in all available medical options. St. Margaret's has Haitian, Southeast Asian, Hispanic, and other non-English speaking patients who do not even know that abortion or sterilization are legal options. And, no matter what strain on their health and life their pregnancy might present, they will not find out about these options.

J.A. 527.

of their beliefs, but because of the federally funded religious practices of the grantees. *See* J.A. 529-30.

e. HHS And AFLA-Funded Programs Convey To The Public That The Government Supports Religion.

AFLA's endorsement of religion is evidenced by letters telling applicants that they were rejected because, for example, "there is no evidence that local churches or pastoral help and training will be used." R. 155, A., I-A, 505E.

As the district court found, "the fact that AFLA programs were held in rooms full of religious symbols" and that there was "joint presence of denominational personnel and federally funded employees" created the "symbolic tie, if not actual tie, between government and religion." J.S. App. 37a & n.17. In addition, in many instances the publicity for AFLA programs linked the receipt of federal funds to specific religious tenets of particular religions. This created the public impression that the federal government approved and sponsored the doctrines of certain religions.[50]

Catholic Social Services of Wayne County advertised its program with a flyer announcing:

> A parish resource . . . Catholic Social Services of Wayne County presents: CASI* COMMUNICATION AROUND SEXUAL ISSUES . . . In keeping with the Pope's strong guideline, Catholic Social Services of Wayne County developed and received funding for a special program . . . .

The asterisk refers the reader to the bottom of the flyer which states "*C.A.S.I. is a Federally funded Adolescent Family Life Demonstration Project." J.A. 576. CSS's publicity efforts were designed to reach a primarily Catholic audience. R. 155, A., IV, 358-59; J.A. 576.

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50 The religious nature of sexuality education was so interwoven with the "secular" for Catholic Charities of Arlington that the Bishop's announcement about the program explained that while federal money could not be used to "teach" religion, "Charities staff" would be "coordinating efforts with pastors, directors of religious education and other Diocesan offices as appropriate to provide the *religious dimension*." J.A. 213 (emphasis added).

Catholic Family Services of Amarillo, Texas, announced in a press release that was attached to their AFLA progress report that "the Adolescent Pregnancy Care and Prevention Program is a welcome addition and will provide new opportunities to carry out the mission of Catholic Family Services." J.A. 155. That mission as stated on page one of its grant application includes "emphasiz[ing] the truth of Christ through which a loving God makes Himself available to all persons." *Id.*; R. 155, A., IV, 72. News articles announcing the Catholic Family Services grant linked the Federal money with Catholic beliefs.[51]

The University of South Carolina sent letters to ministers who failed to attend a Minister's Action Coalition meeting set up under the AFLA program. The letter stated in part:

> It really is up to the churches of our community to define what behavior is morally acceptable and advisable. The churches have traditionally set the moral standards for the community.

R. 155, A., IV, 422-23. This sent a message of government endorsement of religious groups defining what sexual behavior and life decisions are morally acceptable. Similarly, Lutheran Family Service sent out "Dear Pastor" letters announcing the grant, asking them to "share a message from Lutheran Family Service at one of your next circuit meetings," and informing them that among others they would be seeking ideas from the "church community" "as to the most appropriate scenarios" for their adoption advertisements. *Id.* at 245.

In addition, as the court found, "the overwhelming number of comments shows that program participants[52] believed that

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51 An article appearing in the *Amarillo Globe Times* (Nov. 24, 1982), announced that CFS of Amarillo had received a $250,000 grant from the federal government for the development of education and counseling services for adolescents. The article goes on to note that "The agency, due to *religious doctrine*, recommends adoption for children born to young *unwed* mothers." J.A. 561 (emphasis added). Another article about the government grant stated: "Since the agency [CFS] is Catholic, no contraceptive devices or birth control pills will be offered." R. 155, A., IV, 126.

52 Likewise, secular grantee Northwest Louisiana Adolescent Family Life Project aimed its programs at a narrow audience belonging to "churches, church facilities, parochial schools and other religious institutions." R. 155, A., IV, 197-209.

these federally funded programs were also sponsored by the religious denomination." J.S. App. 37a.

f. The Values Promoted By The AFLA Are Of Core Theological Concern To Some Religions.

The values promoted by the AFLA, including the encouragement of premarital chastity and adoption and the discouragement of abortion, may very well be secular values under some circumstances. Nonetheless, they lose their secular nature when promoted in theological terms or taught by religious figures or institutions.

As the district court found, "the harm of premarital sexual relations and the factors supporting a choice of adoption rather than abortion . . . are fundamental elements of religious doctrine." J.S. App. 28a. Thus, by providing aid to religious organizations for the purpose of teaching these values, "the AFLA contemplates subsidizing a fundamental religious mission of those organizations." J.S. App. 30a.

Plaintiffs submitted unrebutted evidence establishing that, for religious groups, abortion and other issues relating to sexuality are religious issues.[53]

Plaintiffs also established that the issue of abortion is deeply divisive among religious denominations. The position a particular religious group takes on abortion depends on that group's theological beliefs concerning, for example, the value of the fetus, the value of the woman's life and well-being, the importance of individual decisionmaking, and the role of sexuality. J.A. 595, 599, 601-05.

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53 Dr. Paul Simmons, a Baptist Minister and professor of Christian Ethics, stated:

> The very purpose of religion is to transmit certain values, and those values associated with sex, marriage, chastity and abortion involve religious values and theological or doctrinal issues. In encouraging premarital chastity, it would be extremely difficult for a religiously affiliated group not to impart its own religious values and doctrinal perspectives when teaching a subject that has always been central to its religious teachings.

J.A. 597; *see also* J.A. 607.

While some religious groups have tenets that make abortion a sin, others deem abortion to be a religious choice to be made by the individual, and still others believe abortion to be religiously required in some circumstances.[54]

The related issues of premarital sexual intercourse and birth control are also religious matters of central importance to religions and about which religions disagree. By requiring religious organizations to be involved in a program designed to stress sexual chastity prior to marriage, rather than abstinence or the use of birth control during adolescence, the AFLA inevitably furthers the theological beliefs of certain religions over others.

The teachings of the Roman Catholic Church emphasize the sacred nature of the marital relationship and condemn not only abortion, but all "artificial" means of contraception. Pope Paul VI, encyc. letter *Humanae Vitae: Acts Apostolicae Sedis* 60 (1968), *reprinted in The Papal Encyclicals, 1958-1981*, 223, 226-27 (C. Ihm, ed. 1981). Natural family planning is the only form of birth control acceptable to the Catholic Church. *Id.* at 227.[55] Many conservative Protestant sects have similar views. *See* R. 155, A., I, 80-81, 84; R. 155, A., VI, 136, 152.

By contrast, the Jewish faith does not condemn the use of contraceptives. *See* R. 120, 18-19. The view of the religious plaintiffs is that decisionmaking is the responsibility of the individual and the role of the church is to provide information

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54 In fact, under Jewish law, where pregnancy threatens the life or health of a pregnant woman, it is her religious duty to have an abortion. J.A. 600. Methodist teachings hold not only that a pregnant woman should be permitted to make her own decisions regarding pregnancy but also that she should be counseled on all available options, including abortion. J.A. 606.

55 The government agreed with the following characterization by the plaintiffs of the Catholic Church's position on these issues:

> Another religious tenet of the Roman Catholic Church holds that "Sexual intercourse divorced from the context of procreation loses its significance, exposes the selfishness of the individual, and is a moral disorder." Vatican Congregation for Catholic Education entitled "Educational Guidance in Human Love," Nov. 1, 1983.

J.A. 684. *Compare* R. 120, 53-54 ("chastity as an absolute which would lead to celibacy is not condoned at all in the Jewish community").

and guidance to help the individual exercise his or her own moral judgment. *See* R. 121, 20, 22-23, 28, 46-47; R. 118, 19, 49, 59; R. 119, 15, 26, 29, 38-39, 40-41; R. 122, 38, 58, 62-63.[56]

g. The AFLA Promotes Certain Religious Denominations While Denigrating Others.

The AFLA anti-abortion restrictions have limited religious grantees to those with theological dictates opposed to abortion. Religions that view the decision whether to have an abortion as a matter of individual conscience or as sometimes religiously mandated cannot, consistent with their religious views, teach an AFLA sex education course or implement an AFLA case project which forbids the mention of abortion in pregnancy counseling.

The Act's discrimination among religions is revealed by the self-selecting application process. Of the fifty AFLA grant applicants in 1982 that are immediately identifiable as religiously affiliated organizations, all but one share the Act's anti-abortion bias. R. 107, Ex. 7.[57] Of the identifiable religiously affiliated grantees receiving funds under the AFLA, *all* have been conservative *Christian* groups.

Religions are disadvantaged by the government's endorsement of only those religions whose doctrines coincide with the values to be promoted by AFLA. Plaintiff ministers all testified that their work has been made more difficult by the

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56 The reason intervenor defends the AFLA is because it furthers particular religious beliefs. In the district court, intervenors argued that enjoining the AFLA would interfere with the free exercise of religion "of parents, including defendant-intervenors, whose religious faiths forbid abortion and premarital sex and require them to raise their children according to these tenets." R. 147.

57 In addition to submitting affidavits and other unrebutted evidence of the applicants' positions on abortion, *see* R. 155, Statement, I, ¶ 24, plaintiffs asked the court below to take judicial notice of the applicants' religious beliefs on abortion, pursuant to Fed. R. Evid. 201. *See United States v. Kahane*, 396 F. Supp. 687, 692 (S.D.N.Y.), *modified on other grounds*, 527 F.2d 492 (2d Cir. 1975). Thirty-eight of the identifiably religious applicants were affiliated with the Roman Catholic Church, ten were Protestant groups that adhered to tenets opposing abortion, and one was a Mormon group that also opposed abortion. The one remaining organization was affiliated with the Methodist Church and was not funded. R. 107, Ex. 7.

AFLA's sponsorship of religious beliefs antithetical to their own. For example, Reverend Vaughn, who teaches a sex education course for teenagers near the AFLA funded course taught by Catholic Charities, testified that because the AFLA put the "whole weight of Government . . . behind a particular view of sexuality," he had to put more time and effort into articulating how Methodist beliefs on sexuality differ from those of other faiths. R. 122, 25-27, 38-40. He described counseling an adolescent who had attended a sex education program taught by him as well as an AFLA-funded sex education program sponsored by Catholic Charities of Arlington. *Id.* at 19-21.

The AFLA also interferes with the religious beliefs of many of the adolescents who participate in the funded programs. The government claims that the religiously affiliated grantees, like other grantees, provide funded services without regard to the recipients' religious affiliation. *See, e.g.*, J.A. 438, 442, 451, 460, 494. But this simply means that all adolescent participants, including adolescents whose religious beliefs differ from those promoted by the AFLA as well as those with no religious beliefs at all, are exposed to the same government-sponsored, religious values and tailored information. All "*patients*" as well as employees of Catholic health facilities must "respect and agree to abide by" the Ethical and Religious Directives of Catholic Facilities which require adherence to Catholic doctrine on reproductive health. J.A. 541. The student comments that are available from the St. Margaret's and St. Ann's programs indicate that they recognized the religious content of the federally funded programs:

> I don't think they should try to discourage kids from using birth control because the Church says not to. Some kids have made mature decisions and dwelling on what the Church says may give them a guilt trip.
>
> . . . .

J.A. 522.

> Even though this is a Catholic school, I feel the actual facts are more important than moral issues and how the church feels.

R. 155, A., II, 495.[58] Unsolicited comments from a participant in St. Ann's program about a lecture on "intimacy" complained that many of the girls felt that the lecture was "a preached sermon" and that they didn't like "being preached at." J.A. 373.

As plaintiffs have thoroughly documented, the religiously affiliated grantees did, in fact, use AFLA funds to teach and provide care in accordance with their own religious dictates. *See supra* pp. 9-22. One book used for at least a year and a half in the St. Ann's program denigrated both Judaism and Eastern religions.[59] Furthermore, both secular and sectarian organizations funded under the AFLA discriminated among religious denominations in involving religious and community organizations pursuant to the AFLA.[60]

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58 Other students wrote:

> More information on birth control, but not how the church feels.
>
> . . . .
>
> The most effective birth control other than what the Church approves of. She spent so much time on the natural family planning (rythm [sic] method) as a good thing because the Church approves it but she failed to mention that it is not good for teenagers to use this method—it's not really safe.

J.A. 522.

59 R. 106, Ex. 15, 41-42, 167-68. This was one of the two books HHS eventually asked St. Ann's to discontinue using. *See supra* p. 14 n.29.

60 SEMO reported that they "avoid ministerial alliances and other ecumenical groups" because "anything the ministerial alliance is for, the more fundamentalist churches are likely to be against." J.A. 566. A state grantee, the Woman's Advocacy Bureau of the Louisiana Department of Health and Human Resources, stated that it would involve "the *major* religious denominations in the Baton Rouge area, including Catholic, Baptist, and Methodist." R. 88, Vol. 4, Grant 102, Response #3 (emphasis added). Grantee Family Service Agency of San Francisco notified HHS that it would include only "San Francisco Council of Churches, [and] Catholic and Jewish Religious Representation." *Id.*, Grant 101, Response #3. The Director of the AFLA program of Catholic Social Services of Wayne County stated that invitations for membership on the AFLA advisory committee ("open to all who chose to participate") were sent to "clergy from *both Protestant* and *Catholic* churches" and reported that "clergy (Catholic and Protestant)" were represented over time on the committee. R. 181, Zettle Aff. ¶ 112.

SUMMARY OF THE ARGUMENT

No prior case before this Court has ever documented so thoroughly a statute's actual advancement of religious belief and the spiritual and physical harm resulting from that advancement.

This Court has recently stated that the Establishment Clause "*primarily* proscribes 'sponsorship, financial support, and active involvement of the sovereign in religious activity.' " *Grand Rapids School Dist. v. Ball*, 473 U.S. 373, 381 (1985) (emphasis in original) (quoting *Committee for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 772 (1973)). Plaintiffs' uncontroverted facts establish, and the district court held, that the AFLA flouts all three of these proscriptions. Under *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971),[61] this Court must declare the AFLA unconstitutional.

The AFLA endorses religion by requiring all programs funded under the Act to involve religious organizations; by failing to provide statutory assurances that public money will be used only in secular ways; and by selectively funding only those religious groups that hold specific theological views on sexuality and reproduction.

Pursuant to the Act, the government has funded both secular and sectarian grantees to teach religion in public and parochial schools. The government has funded grantees to teach Catholic doctrine on chastity, masturbation, homosexu-

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61 This Court has used the *Lemon* test in cases ranging from giving direct aid to parochial schools, *Lemon v. Kurtzman*, 403 U.S. 602 (1971), to giving churches political power, *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982), to erecting religious symbols in public settings, *Stone v. Graham*, 449 U.S. 39 (1980); *Lynch v. Donnelly*, 465 U.S. 668 (1984), to imposing regulations that entangle church and state, *Aguilar v. Felton*, 473 U.S. 402 (1985). Properly applied, the *Lemon* test invalidates the AFLA even more clearly than in these prior cases.

ality, birth control and abortion, and to provide programs that included the "Biblical and theological views regarding sex." J.A. 568. The government has funded health care programs that are restricted by religious dictates which may conflict with adolescents' health needs. This government funding has the effect of enhancing the stature and political influence of some religious groups and of sending an unmistakable message of government endorsement of particular religious views.

The district court found it "impossible to comprehend entanglement more extensive and continuous than that necessitated by the AFLA." J.S. App. 42a. This holding is amply supported by the religious character and purpose of the institutions, the nature of the aid, which is highly susceptible to the infusion of religious beliefs, and the extensive and continual monitoring by the government of religious activity that would be necessary to ensure secular use of AFLA funds.

The far-reaching theories put forth by the government and intervenor cannot obscure the simple fact that Congress has promoted and continues to promote religion through the AFLA. This case is *not* about the constitutionality of religious organizations' participation in programs established under properly constructed statutes respectful of the establishment clause's limiting principles. The issue in this case is whether we will continue to operate within a system of government that is separate from religion, and which does not "aid one religion, aid all religions, or prefer one religion over another." *Everson v. Board of Educ.*, 330 U.S. 1 (1947). If the government may fund, as it does under the AFLA, both religious institutions and secular institutions to promote religious beliefs, then the protection offered by the religion clauses will be nothing more than a paper promise.

I. THE AFLA VIOLATES THE *LEMON* "EFFECTS" TEST BECAUSE IT IMPERMISSIBLY ADVANCES RELIGION.

There can be no question that the AFLA not only risks the advancement of religion but that it actually does advance

religion. The AFLA's mandates on religious involvement give religion a preference over nonreligion. HHS funding decisions carry out the legislative intent to promote religion.

For example, the only 1982 program that was not re-funded—not because it was too religious, but because it was not religious enough—was the University of Arkansas. Sheeran testified that despite receiving the Arkansas Medal of Excellence, a positive review from OAPP staff and high scores on an objective scale,[62] the University of Arkansas program was not re-funded because Mecklenburg "caved in" to pressure from people who felt the materials used by the university were "Godless" and violated their religious beliefs. J.A. 132-34. Instead, the grant went to FAF, an indisputably religious organization, which received a grant seven times as large. J.A. 751-52. Mecklenburg testified that FAF's program, which promoted a religious philosophy, J.A. 143, was "more complementary and provided a different perspective" than that of the University of Arkansas. J.A. 83.[63]

The government goes badly astray when it implies that as long as the benefited institutions are not "pervasively sectarian," sectarian activities may be subsidized. Gov. Br. 27. The "pervasively sectarian" inquiry is useful only because it identifies institutions for whom no degree of legislative care in the disbursement of aid will suffice to ensure that funds are used solely for secular ends. But where cash grants have not been restricted to secular purposes by statute, or worse, where they have been designated for sectarian purposes, ruminations

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62 Although the University of Arkansas was told by OAPP that the reason they were not re-funded in 1983 was that they "did not score . . . high enough," OAPP officials admitted in depositions that they lied. J.A. 135; R. 107, 128.

63 FAF's identical 1982 application scored so low it was not even considered for funding. Two government agencies would not approve or recommend FAF for funding and the grants manager for HHS Region VII noted that FAF proposed to "promote its values at public expense." R. 155, A., I-A, 539-42; J.A. 145.

about the degree of sectarianism are not necessary.[64] This Court's prior cases involving government aid to religious institutions, from *Everson v. Board of Education*, 330 U.S. 1 (1947), to *Aguilar v. Felton*, 473 U.S. 402 (1985),[65] make clear that the heart of the effects analysis is not the pervasively sectarian inquiry, but whether the proffered assistance can reliably be limited to secular ends to ensure that a sectarian enterprise is not advanced.[66] Numerous AFLA grantees in this case *were* in fact "pervasively sectarian," but the AFLA program fails constitutional muster for two independent, analytically prior, reasons: The AFLA grants are not statutorily earmarked for solely secular purposes, and they are, in fact, earmarked for specifically sectarian tasks.

A. The AFLA Is Unconstitutional Because It Funds Specifically Religious Activity And Religious Institutions.

The district court found that both on its face and as applied the AFLA has a primary effect of advancing religion. J.S. App. 27a, 32a. Congress intended, and the statute explicitly requires, religious organizations to participate in AFLA programs as either grantees or as paid or unpaid participants.

Although 1982 grantees were told at an orientation conference that they could not teach religion, they were simultaneously told that they could base their programs on religious principles, that they should involve "churches," and that the AFLA was a joint project between churches and the federal government to promote chastity. J.A. 120-27, 163-64. The

64 In *Nyquist*, 413 U.S. 756, and *Levitt v. Committee for Pub. Educ. & Religious Liberty*, 413 U.S. 472 (1973), the Court struck down various forms of state aid to parochial schools. The Court premised its decisions on the fact that the proffered aid could not be restricted to secular ends rather than on a finding that the schools were "pervasively sectarian."

65 The chart that appears as Appendix C to this brief suggests a framework for understanding this Court's government aid cases under the *Lemon* effects test.

66 Thus, in *Tilton v. Richardson*, 403 U.S. 672 (1971), the plurality *first* determined that the statute adequately segregated the funds and *then* stated that the plaintiff could therefore prevail only if he demonstrated that recipient institutions were "pervasively sectarian." *Id.* at 679-82.

written outline for the OAPP staff presentation to orient AFLA grantees in November 1982 stated:

> *Will this program succeed*? Churches have been involved in this area for a long time. Their efforts have not been 100% successful . . . . However, we do hope that through joint efforts between public and private entities including churches and the Federal Government we will have a significantly beneficial impact on the problems associated with adolescent pregnancy.

J.A. 163. This reinforced the unique and central theme of the legislation: to unite government and religion in a joint effort to promote sexual abstinence and adoption.

It is clear that the AFLA has a primary effect of advancing religion and is therefore unconstitutional under the second *Lemon* prong, because it funds "specifically religious activit[ies]." *Hunt v. McNair*, 413 U.S. 734, 743 (1973). This is not a case requiring the Court to predict the likelihood that government funds will be used for religious purposes;[67] the evidence is overwhelming that funds, in fact, advanced religion. Anne Ridder recalled that Reverend Creeden, speaking at one of the programs presented by Catholic Charities of the Diocese of Arlington, told parish adolescents and their parents:

> You want to know the church teachings on sexuality. . . . You are the church. You people sitting here are the body

67 Appellants incorrectly cite *United States v. Salerno*, 95 L.Ed.2d 697 (1987), for the proposition that the AFLA must be deemed constitutional on its face unless plaintiffs "establish that no set of circumstances exists under which the Act would be valid." Gov. Br. 30. This standard does not apply to challenges based on the Establishment Clause; numerous cases have explained that the mere *risk* of establishment of religion is sufficient to warrant invalidation of a statute. *See Lemon v. Kurtzman*, 403 U.S. at 612 ("A given law might not *establish* a state religion but nevertheless be one 'respecting' that end in the sense of being a step that could lead to such establishment and hence offend the First Amendment") (emphasis in original); *Grand Rapids*, 473 U.S. at 388-89 ("[T]here is a 'substantial risk' that programs operating in this environment would 'be used for religious educational purposes'. . . . Thus, the lack of evidence of specific incidents of indoctrination is of little significance."). That is, the risk itself constitutes the Establishment Clause violation. *See also Meek v. Pittenger*, 421 U.S. 349, 370-72 (1975).

> of Christ. The teaching of you and the things you value are, in fact, the values of the Catholic Church.

J.A. 226. Certainly, appellants cannot deny that St. Margaret's used federal money to promote "the church's teaching" on sexuality, or that Catholic Charities of Arlington presented and facilitated a session on the church's teaching at every funded program, or that Catholic Family Services of Amarillo used a curriculum guide with explicit religious references. Nor can they deny that secular grantees like Charles Henderson and SeMo sought to strengthen and promote church teachings and institutions as a means of discouraging teenage sexuality and abortion. *See supra* pp. 9-22.

Moreover, plaintiffs proved that grantees used federal money to structure and then teach from curriculums that were designed to be compatible with particular religious beliefs. *Cf. Edwards v. Aguillard*, 96 L.Ed.2d 510, 520 (1987) (" '[T]eaching and learning' must not 'be tailored to the principles or prohibitions of any religious sect or dogma.' " (quoting *Epperson v. Arkansas*, 393 U.S. 97, 106 (1968)). St. Margaret's used a parochial school curriculum designed to promote Catholic doctrine. Its public school curriculum, based entirely on its parochial school one, was fundamentally the same. J.A. 411. Search Institute and St. Ann's developed curriculums directly derived from a pre-existing Catholic curriculum. St. Ann's used a curriculum that referred repeatedly to God and Christianity and also gave skewed information on contraceptives to conform with church teachings. J.A. 294-96, 316-17, 337, 350-53, 360-61, 363-64. SeMo "encourag[ed] churches to use sexuality education materials already available through their denomination[s]," J.A. 566, and Memorial General Hospital sponsored sessions that asked "How have our values changed since Christ's day?" R. 155, A., IV, 292.

The AFLA's impermissible effects are not limited to recipients of grants or subgrants. Those religious groups that are singled out to be AFLA participants or are AFLA advisory board members also gain a benefit by virtue of the government endorsement of their beliefs and of the power granted them by HHS or local government AFLA grantees to approve or shape AFLA programs or materials. When *only* Catholic or Protestant clergy are invited to be on the advisory committee of an

AFLA program, *see, e.g., id.* at 346, or when "conservative fundamentalist churches" are contacted first and targeted for special attention, J.A. 565-66, these religious groups also receive a government endorsement even though they do not receive funding.[68] *Cf. Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982).

By ensuring the involvement of religious groups in the teaching of specific sexuality values, the AFLA on its face impermissibly funds "specifically religious activity" under the AFLA program—an independent measure of the AFLA's unconstitutionality. It violates the "core rationale underlying the Establishment Clause [which] is preventing 'a fusion of governmental and religious functions.' " *Larkin*, 459 U.S. at 126 (quoting *Abington School Dist. v. Schempp*, 374 U.S. 203, 222 (1963)).[69]

The subject matter of AFLA programs heightens the risk of religious advancement. It may be that no subject is inherently "religious" or "secular" in all contexts. References to the afterlife or to the existence of a divine Creator acquire a different tenor from the pulpit than in a class on medieval philosophy. The subjects of the AFLA—intercourse, contraception, abortion—may not be forever and in all circumstances "religious" issues. But in the hands of religious institutions, often limited by adherence to religious authority on these very same issues,[70] acting on the instructions of a statute that

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68 Of course, plaintiffs are not contending that the mere presence of a clergymember on a government-sponsored panel is constitutionally suspect.

69 *Cf. Schempp*, 374 U.S. at 281 (Brennan, J., concurring) ("While I do not question . . . that the challenged practices may well achieve valuable secular ends, it seems to me that the State acts unconstitutionally if it either sets about to attain even indirectly religious ends by religious means, or if it uses religious means to serve secular ends where secular means would suffice.").

70 "There is a historic and contemporaneous link between the teachings of certain religious denominations and the teaching" of sexual education. *Edwards*, 96 L.Ed.2d at 523 (discussing evolution). In one book for teenagers used by an AFLA grantee for at least a year and a half, teenagers were taught "[t]he crucifixion was a passionate, symbolic, physical gesture of love as intercourse is." Intercourse is "the seal of a covenant that will last until

demands religious involvement—the risk that these subjects will be taught in a religious way is constitutionally unacceptable.[71]

As the district court noted, and based on plaintiffs' uncontroverted evidence, these issues are of fundamental religious importance. And in the public arena they have taken on special significance marking central denominational difference and strife.[72] "[R]eligious groups inevitably represent certain points of view and not infrequently assert them in the political arena, as evidenced by the continuing debate respecting birth control and abortion laws." *Walz v. Tax Comm'n*, 397 U.S. 664, 695 (1970) (Harlan, J., concurring).

Intervenor argues that the centrality and divisive nature of sexuality issues to religious groups is irrelevant because "[v]irtually every activity conducted by religious organizations is related to their religious mission." Int. Br. 16-17.[73] It argues

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death." "The good news about sex is that Jesus Christ has made it the expression of a level of love that is proper to God alone." R. 106, Ex. 15, 165-66, 174.

71 This case is plainly distinguishable from *Harris v. McRae*, 448 U.S. 297 (1980), where this Court found that the Hyde Amendment, which cut off Medicaid funds for abortion, did not violate the Establishment Clause because the congressional purpose could have been morally or ethically based. *Id.* at 319. The AFLA, however, involves funding religious organizations, for whom abortion is clearly a religious issue, in teaching anti-abortion values. Plaintiffs are *not* arguing, as was argued in *McRae*, that discouraging abortion is an unconstitutional religious purpose behind the AFLA. Plaintiffs argue only that government funding of religious groups to teach anti-abortion values creates an unconstitutional risk that religious values will be promoted.

72 Archbishop O'Connor, for example, has stated "I don't see how a Catholic in good conscience can vote for a candidate who explicitly supports abortion," N.Y. Times, June 25, 1984, § IV, at 13, and that abortion is his "No. 1 priority," National Catholic Rep., Feb. 10, 1984, at 20.

73 Furthermore, for the Catholic Church, issues of sexuality play a role of fundamental importance, treated at least in some ways differently than the issues of poverty and homelessness. For example, "procuring an abortion" is one of only seven "crimes" for which the penalty is automatic excommunication. In 1983, the Catholic Church reduced from 37 to 7 the number of "crimes" for which a Catholic would be automatically excommunicated. *The*

that under the district court's opinion religious organizations should be barred from programs to feed the hungry and house the poor "merely because these advance religious objectives at the same time that they achieve the government's secular purpose." *Id.* at 17. This analogy, however, fundamentally distorts the issues in this case. The proper analogy to the AFLA would be to a statute that funded sectarian groups to *teach* and *promote* their religious values on homelessness and hunger in the hopes that that indoctrination would help alleviate these social problems.[74]

B. The AFLA Is Unconstitutional Because It Lacks Any Statutory Safeguards.

It is undisputed that numerous AFLA grantees, subgrantees and participants are, in fact, "religious" by virtue of their affiliation, sponsorship, and stated policies. Yet the statute imposes absolutely no restriction on the ability of these religious grantees to use federal funds to further their own religious missions. The AFLA lacks the constitutionally mandated guarantee that granted funds will be used only for "secular, neutral, or nonideological" purposes.[75] The AFLA

Code of Canon Law 19 (J. Coriden, et al., ed. 1985). While "procuring an abortion" is included, failing to do enough to help the poor clearly is not a basis for automatic excommunication. The seven include: (1) "apostasy, heresy, schism"; (2) "violation of the consecrated species"; (3) "physical attack on the pope"; (4) "absolution of an accomplice in a sin against the Sixth Commandment"; (5) "unauthorized ordination of a bishop"; (6) "direct violation by a confessor of the seal of confession"; and (7) "procuring an abortion." J. Huels, *The Pastoral Companion* 135 (1986).

74 Moreover, religious groups could not be funded to provide services that lose their purely secular status when given in accordance with specific religious dictates.

75 Government aid to a religious institution may be permissible if the aid is inherently "secular, neutral, and nonideological" and any assistance to the sectarian enterprise is merely "indirect, remote, or incidental." *E.g.*, *Nyquist*, 413 U.S. at 771, 780. Into this category falls the loan of secular textbooks to parochial school students, *Board of Educ. v. Allen*, 392 U.S. 236 (1968) (state-provided textbooks were secular and provided equally to all school children); payment for bus transportation for parochial school stu-

gives money, for example, to Catholic organizations to promote adoption over abortion but nothing in the Act prohibits Catholic grantees from doing so by teaching that an embryo is infused with a soul from the moment of conception. As held by the district court, this alone renders the AFLA program unconstitutional. J.S. App. 29a & n.13, 31a.

This Court has held that Congress may not give cash grants to any religious institution without ensuring by statute that the grant will be used solely for secular purposes:

> In the absence of an effective means of guaranteeing that the state aid derived from public funds will be used exclusively for secular, neutral, and nonideological purposes, it is clear from our cases that direct aid in whatever form is invalid.

Nyquist, 413 U.S. at 780; *see also Roemer v. Board of Pub. Works*, 426 U.S. 736 (1976) (plurality opinion); *Levitt v. Committee for Pub. Educ. & Religious Liberty*, 413 U.S. 472, 479-80 (1973); *Tilton v. Richardson*, 403 U.S. 672, 682-84 (1971) (plurality opinion). In *Tilton*, for example, this Court upheld federal construction grants to religious (but not "pervasively sectarian") colleges,[76] but only to the extent that grant restrictions prohibiting the use of buildings constructed with such funds for sectarian purposes remained effective; the Court declared invalid that part of the grant conditions that lifted such restrictions after twenty years.[77]

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dents, *Everson*, 330 U.S. 1 (bus transportation was provided for all school children); diagnostic testing of parochial students, *Wolman v. Walter*, 433 U.S. 229 (1977) (nonpublic school controlled neither the content nor results of subsidized tests and diagnostic testing was performed by public personnel); and therapeutic services provided for such students off-premises by public employees, *id.*

76 The Court in *Tilton* specifically found that religion did not "so permeate[ ] secular education provided by church-related colleges and universities that their religious and secular educational functions are in fact inseparable." 403 U.S. at 680 (plurality opinion).

77 403 U.S. at 682-84. *See also Roemer*, 426 U.S. at 759-67 (plurality opinion), in which the relevant statute had been amended after *Lemon* to ensure that state aid was extended only to secular activities. The Court's opinion makes clear that the absence of such a provision would have led to a different result in *Roemer*. *See especially id.* at 767 n.23.

Appellants, understandably, do not deny the absence of statutory safeguards in the AFLA.[78] They assert that a clause in the grant award letter suffices because it prohibits grantees from using the funds to "teach or promote religion." This clause, inserted in grant letters only after this litigation was instituted, is wholly inadequate to correct the numerous constitutional problems recognized by the court below.

In an open-ended program like the AFLA, a prohibition on the "teaching or promotion of religion" is inadequate to ensure that funds be used only for secular purposes.[79] Diversion of funds to sectarian ends may be accomplished in many ways other than explicit "teaching or promotion." "Sectarian instruction, in which, of course, a State may not indulge, can take place in a course on Shakespeare or in one on mathematics" or in one on sexual education. *Lemon*, 403 U.S. at 635 (Douglas, J., concurring). If "history can be given the gloss of a particular religion," so too can a course teaching specific sexuality values. *Id.* at 636.

Moreover, *Tilton*, 403 U.S. 672, insisted on *statutory* safeguards notwithstanding the fact that the Constitution demands the same result. The district court described the grant letter clause as "merely an unpublished administrative warning that was written at agency discretion and can be revoked by agent fiat." J.S. App. 29a n.13. The court properly concluded that "[n]o case permits a court to find that such a discretionary

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78 That the absence of such a guarantee was not mere inadvertence, curable through a flexible reading of the statute, is clear from the Act's language, which requires religious involvement, J.S. App. 28a, 29a n.13, its legislative history, and the Act's numerous other prohibitions and restrictions on eligibility. *See supra* pp. 4-5. By contrast, the statutes in *Hunt v. McNair*, 413 U.S. 734, 741 (1973); *Tilton*, 403 U.S. at 676-77; and *Roemer*, 426 U.S. at 740, were grant authorizations of a general nature, available to all accredited institutions on a noncompetitive basis, and restrictions on the funding of sectarian activities were in fact the primary statutory limitation on eligibility.

79 Though to go further would unconstitutionally entangle government and religion. *See infra* pp. 45-53.

statement adequately protects against sectarian use of public funds." *Id.*[80]

Appellants' pale defense of the grant clause is most remarkable for its herculean effort to avoid the actual facts in this case. In an area of the law where even the *risk* of government-sponsored sectarian instruction is regarded as sufficient to warrant invalidation, the actual documentation of such activities by a substantial percentage of AFLA grantees speaks louder than any statutory exegesis. Whereas cases such as *Meek*, 421 U.S. 349, and *Grand Rapids*, 473 U.S. 373, involved no documented instances of religious indoctrination, repeated instances of religious indoctrination by AFLA grantees have been documented and are unrebutted. Of the 726 material facts submitted by the government in the district court, only four concerned monitoring and enforcement. No action taken ever investigated the degree of sectarianism of an institution, guaranteed the secular use of funds or recouped any of the tens of thousands of dollars of federal funds used to teach religion.[81]

Grantees, once funded, received no direction or supervision from HHS concerning regulating the religious content of the

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80 The intervenor opines that the "AFLA grant conditions are similar to those attached to most federal grant projects," and then proceeds to cite three projects. Int. Br. 33-34. Those restrictions, however, were also located in a statute or regulation, making them quite unlike the Notice of Grant Award in this case. Intervenor is correct, however, in noting how common such *statutory* restrictions are in federal grant programs. *See, e.g.*, 20 U.S.C. § 27 (Vocational Educational Act); 20 U.S.C. § 241-1 (a)(1)(B), (a)(4) (Elementary and Secondary Education Act of 1965); 20 U.S.C. §§ 1021(c), 1062(b)(1), 1069c(1), 1070e-1(c)(2)(A)(ii), 1132g-3(c)(2), 1132i(c), 1134e(g) (Higher Education Act of 1965); 20 U.S.C. § 1210 (Adult Education Act); 20 U.S.C. § 3862(c)(2) (Education Act of 1965); 42 U.S.C. § 2753(b)(2)(C) (Work-Study Program); 42 U.S.C. § 5001(a)(2) (Retired Senior Volunteer Program).

81 For example, HHS never sought to recoup the funds given to Catholic Charities of Arlington and to St. Margaret's even though both programs used their funds to teach Catholic doctrine on sexuality. In fact, after their 1984-85 funding cycle, when CCDA was not re-funded by HHS, the sole reason was the "failure to make its program accessible to the public generally." J.A. 784, 742.

programs. R. 112, 529-30; J.A. 178.[82] OAPP grant conditions for 1982 and 1983 contained no restriction on religious use of AFLA money.[83] OAPP staff made site visits to AFLA classes in parochial schools and church parishes and received progress reports and continuation applications with statements or clippings submitted by grantees indicating extensive religious content and influence in funded programs. Nevertheless, the OAPP reports were devoid of any recognition or criticism of the evident constitutional implications of these facts. J.A. 170-71, 181, 184.[84]

It is no coincidence therefore that during the AFLA's entire existence, the only steps ever taken by HHS to ensure secular use of federal funds came in direct response to information revealed in this lawsuit and failed even then to meet constitutional mandates. *See supra* pp. 11 n.22, 14 n.29, 17 n.38, 18-19 & n.40.

C. The AFLA Is Unconstitutional Because It Funds "Pervasively Sectarian" Organizations.

Direct cash grants to "pervasively sectarian" institutions are impermissible no matter how carefully limited or nonideological the activity. "[N]o state aid at all [may] go to institutions that are so 'pervasively sectarian' that secular activities cannot be separated from sectarian ones." *Roemer*, 426 U.S. at 755

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82 Despite repeated inquiry from OAPP staff, Mecklenburg issued no guidelines on how staff should judge or review curriculums or materials that grantees were supposed to submit to OAPP. R. 97, 77-79; R. 112, 520-21.

83 Nor did the grantees receive direction on the abortion restrictions which some viewed as a religious issue. J.A. 123-25.

84 For example, Sheeran admitted that he did not preview curriculum or other materials R. 57, 147-49, 154. Rosengard admitted making a site visit for St. Margaret's to a parochial school to see one of the AFLA prevention programs. R. 74, 95-96. Rosengard, however, had no concerns about religious involvement until February 1984 when asked to investigate their religious curriculum. R. 74, 90-91. Similarly, both OAPP Director Mecklenburg and Rosengard made site visits to St. Ann's without ever expressing concern about the religious symbols present or the influence of Catholic doctrine on the program. R. 92, 38-40; R. 93, 26-29; R. 60, 49-50.

(plurality opinion) (citing *Hunt v. McNair*, 413 U.S. 734 (1973)); *see also Grand Rapids*, 473 U.S. at 392-93.[85]

This Court has identified various factors by which to distinguish institutions that are "pervasively sectarian" (typically, parochial schools) from those that are not (typically, religiously affiliated colleges and universities). For example, does an atmosphere of "academic freedom" prevail, or are there religious restrictions on what may be taught? *Tilton*, 403 U.S. at 681-82. AFLA participants such as St. Margaret's,[86] St. Ann's, and Brigham Young University are plainly pervasively religious because of the comprehensive religious restrictions on what they may do and say. While the AFLA program purports to be "educational" in nature, the statutes, its administration and its grantees all reject "academic freedom." Counselors at St. Margaret's, for example, are not free to contradict Catholic teachings, nor are the adolescent counselees free to receive dissident views.[87]

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85 In *Grand Rapids*, this Court noted that *Committee for Pub. Educ. & Religious Liberty v. Regan*, 444 U.S. 646 (1980), permitting a subsidy for certain state-mandated testing services performed by nonpublic schools, was an exception to the general rule. 473 U.S. at 393. In *Regan*, "[t]he nonpublic school [had] no control whatsoever over the content of the tests" and there were "ample safeguards" against payments for sectarian services. 444 U.S. at 654, 659.

86 St. Margaret's, an obstetrical and gynecological hospital, which received a total of $1,879,118 from HHS, J.A. 754, must be considered pervasively sectarian under any criterion, because it has religious restrictions governing virtually all its reproductive health services and sexual education programs. J.A. 525-55.

87 Kim Maisenbacher, a nurse in St. Margaret's AFLA program stated in an affidavit: "In my employment interview I was told . . . that I would not be able to discuss either abortion or artificial family planning with my patients because to do so would breach the religious tenets of St. Margaret's. I was given a booklet entitled "Ethical and Religious Directives for Catholic Health Facilities" (Exhibit A). It was made clear to me that if the religious rules in this booklet were not followed I could lose my job." J.A. 550.

The district court found that certain AFLA grantees are "pervasively sectarian."[88] Appellants' assertion that the Court "did not consider whether the AFLA grantees (or any one of them, for that matter) are pervasively sectarian" is fatuous. Gov. Br. 45. The AFLA promotes religion in the three impermissible ways described by this Court in *Grand Rapids*:

> First, the teachers participating in the programs may become involved in intentionally or inadvertently inculcating particular religious tenets or beliefs. Second, the programs may provide a crucial symbolic link between government and religion, thereby enlisting—at least in the eyes of impressionable youngsters—the powers of government in the support of the religious denomination operating the school. Third, the programs may have the effect of directly promoting religion by impermissibly providing a subsidy to the primary religious mission of the institutions affected.

473 U.S. at 385.

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88 AFLA grantees and subgrantees have included several organizations with institutional ties to religious denominations and corporate requirements that the organizations abide by and not contradict religious doctrines. In addition, other recipients of AFLA funds, while not explicitly affiliated with a religious denomination, are religiously inspired and dedicated to teaching the dogma that inspired them. While the Court will not engage in an exhaustive recitation of the record, *references to representative portions of the record reveal the extent to which the AFLA has in fact* "directly and immediately" advanced religion, *funded "pervasively sectarian" institutions*, or permitted the use of federal tax dollars for education and counseling that amounts to the teaching of religion.

J.S. App. 33a (emphasis added). Subsequently, the court went on to say: "[T]he inescapable conclusion is that federal funds have been used by pervasively sectarian institutions to teach matters inherently tied to religion." *Id.* at 36a. Finally, the district court stated:

> In sum, the facts demonstrate beyond peradventure the effect of the Adolescent Family Life Act program. . . . In short, defendant has approved AFLA grants and distributed AFLA funds in a manner that advances religion, regardless of whether one looks for a "direct and immediate effect" of advancing religion, a benefit to a "pervasively sectarian" institution, or the use of tax dollars to "teach" religion.

Id. at 38a.

OAPP funded applications based on pre-existing religious programs using the same teachers and religious materials that ultimately appeared in the AFLA-sponsored curriculum. Clearly they *will* and *have* "become involved in intentionally or inadvertently inculcating particular religious tenets or beliefs."[89] Second, the impermissible "symbolic link" exists in this case. AFLA staff referred to the program as a "joint effort[ ] between . . . churches and the Federal Government," AFLA grantees publicly stated that their religious beliefs were funded by the government, and AFLA programs were conducted in parochial school classrooms, with all the accoutrements of sectarian education. *See supra* pp. 13-19, 22-24; *infra* p. 48 n.96. This endorsement also occurs when a secular grantee uses religious material[90] or utilizes nonpaid religious consultants or participants.[91] *Cf. Lynch v. Donnelly*, 465 U.S. 668, 691-94 (1984) (O'Connor, J., concurring). The constitutional difficulties with the government endorsement are magnified by the abortion-related restrictions on eligibility for AFLA grants which discriminate among religions.

Finally, the "impermissible subsidy of a primary religious mission"—the third criterion in *Grand Rapids*—is self-evident by virtue of the direct nature of the cash grant with no assurances of secular use.

The government's theory of pervasive sectarianism would require a remand for a factual finding of the degree of sectarianism for each and every AFLA grantee, subgrantee,

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89 As this Court said in *Meek v. Pittenger*, "a state-subsidized guidance counselor is surely as likely as a state-subsidized chemistry teacher to fail on occasion to separate religious instruction and the advancement of religious beliefs from his secular educational responsibilities." 421 U.S. at 371 (footnote omitted).

90 For example, the University of South Carolina put on a play in public schools where they presented the views of "the church" as anti-abortion. J.A. 580.

91 The University of South Carolina organized a "Ministers Action Coalition" with their AFLA funds, and designated churches as "special target areas for community intervention." R. 181, Vincent Decl. ¶ 7; R. 155, A., IV, 420. The Memorial Public Hospital used "Christian Education Teachers" as teachers of workshops. R. 155, A., IV, 294-98.

and non-funded participant. It ignores the over 1,200 admitted facts on the 1982 and 1983 grantees, J.A. 619, and demands "unfortunately" that plaintiffs start discovery anew on the current sixty-two grantees. Gov. Br. 33 n.26. The five-year cap on AFLA grant awards means that under the government's theory, review by this Court could be indefinitely avoided. § 300z-4(c)(1). Such a requirement would discourage, if not foreclose, challenges to government action respecting an establishment of religion, which this Court has recognized are of fundamental importance. *See Flast v. Cohen*, 392 U.S. 83 (1968).

Further, this Court has never required such a detailed itemization. For example, in *Meek v. Pittenger*, 421 U.S. 349 (1975), *aff'g in part and rev'g in part*, 374 F. Supp. 639 (E.D. Pa. 1974) (three-judge court), this Court invalidated Pennsylvania's Acts 194 and 195 as impermissibly aiding "religion-pervasive institutions," though the district court had made no finding of "pervasively sectarian" as to any individual recipient, nor even as to the schools taken as a whole. In fact, not all the recipient schools in *Meek* were religious schools, and this Court could go no farther than to say that the "very purpose of *many of those schools* is to provide an integrated secular and religious education." 421 U.S. at 364, 366 (emphasis added).

Finally, the statute does not exclude pervasively sectarian institutions from being involved with AFLA programs, as grantees or otherwise, nor has OAPP ever attempted to do so. J.A. 71-72. Even the possibility that, under the terms of the Act, pervasively sectarian institutions could be AFLA participants would render the Act unconstitutional.

II. THE AFLA FOSTERS EXCESSIVE ENTANGLEMENT BETWEEN GOVERNMENT AND RELIGION.

The third prong of the *Lemon* test is designed to prevent government from being put in a relationship of supervising the internal working of religions. Considering the virtually open-ended AFLA programs, the district court correctly concluded, "it is impossible to comprehend entanglement more extensive and continuous than that necessitated by the AFLA." J.S. App. 42a.

AFLA programs require vastly more on-going oversight than the Title I programs for remedial aid invalidated solely on this point in *Aguilar v. Felton*, 473 U.S. 402 (1985).[92] The statutory scheme in *Aguilar*, moreover, had seven safeguards not present in the AFLA: the teachers sent to parochial schools in *Aguilar* were under public control; remedial subjects were limited to math, English and reading; Title I services were available to all school children according to need; the teaching took place in "desanctified" classrooms; program instructional materials were the same as used in public schools; public school professionals were responsible for the selection of students; and Title I contained explicit statutory prohibitions against religious teaching. *Id.* at 406-07.

Excessive entanglement was found not only because of the "pervasively sectarian" atmosphere of the schools, but because assistance was "provided in the form of teachers [and] ongoing inspection is required to insure the absence of a religious message." *Id.* at 412. The Court also noted that the close "administrative cooperation" necessary to maintain the programs included judgments by the state "concern[ing] matters that may be subtle and controversial, yet may be of deep religious significance to the controlling denominations." *Id.* at 413, 414.[93]

Although the government argues that entanglement concerns are "unwarranted" where institutions are not "pervasively sectarian," Gov. Br. 44, this Court has repeatedly held that the degree of sectarianism of an institution is to be considered "*cumulatively*" with the nature of the aid and the resulting relationship created between the state and the institution. *Roemer*, 426 U.S. at 766 (emphasis added); *see also Hunt*, 413 U.S. at 747.

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92 In contrast to the AFLA, the Title I programs in *Aguilar* had been in effect for nineteen years with no evidence of religious indoctrination. 473 U.S. at 424 (O'Connor, J., dissenting).

93 *See also Lemon v. Kurtzman*, 403 U.S. at 619; *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 125 (1982); *Larson v. Valente*, 456 U.S. 228, 253 (1982); *Wolman v. Walter*, 433 U.S. 229, 254 (1977); *Meek v. Pittenger*, 421 U.S. at 370.

A. The Degree Of Sectarianism Of An Institution Must Be Assessed In Light Of Its Religious Tenets Governing The Aid At Issue.

The government argues that the hospitals and maternity homes providing AFLA services are so "fully capable" of discharging services in a secular manner that ordinary monitoring is sufficient. Gov. Br. 21, 28, 44. This ignores the uncontroverted record, which demonstrates "beyond peradventure" that funds went to religious institutions "for purposes indistinguishable from their religious aims." J.S. App. 38a.[94] The relevant inquiry for assessing the constitutionality of funding sex education or the provision of reproductive health services in a religious context is whether there are religious restrictions on these activities, not what percentage of the total hospital services they comprise.[95]

The age of the audience and location of the programs are two additional factors in assessing the nature of an institution. This Court has found that college students are "less susceptible to religious indoctrination," so there is less need for surveillance. *Tilton*, 403 U.S. at 686-87. In contrast, some AFLA

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94 The AFLA grant to the St. Ann's maternity home was used to double the number of teachers working under religious directives at the on-site high school whose principal reported to the Daughters of Charity. J.A. 305; R. 93, 53. St. Margaret's had a maternity home and school on its premises, St. Mary's, which used AFLA-funded social workers working under religious directives. R. 228, 6-7, 11-14. The teenagers attending the school were taught segments of the Family Life Course which were tailored to religious beliefs. R. 229, 58; R. 231, 110-11. The religious directives imposed on Catholic hospitals affected the care and counseling of all patients including teenagers in AFLA programs. J.A. 525-55.

95 Although the intervenor expresses concern that a Wisconsin program similar to the AFLA woud be "directly affect[ed]" by an affirmance in this case, Int. Br. 6 n.4., it neglects to point out that Wisconsin has addressed the problem of unconstitutional religious involvement in its program by issuing provisional regulations that define an organization as "pervasively sectarian" and ineligible for funds if *any* one of seven criterion apply, including the following:

> 5. The referral, counseling and/or teaching activities of the applicant are restricted to the religious doctrine of that organization;
> 6. The applicant has a statement prohibiting certain activities due to religious doctrine[.]

See Appendix C to brief.

programs have started as early as first grade, and the majority of programs are for teenagers, some of whom are pregnant and vulnerable. J.A. 551. Further, AFLA programs often take place in sectarian settings with religious symbols throughout. J.S. App. 36a.[96]

B. The Nature Of The Aid Provided Under AFLA Grants Requires Close And Entangling Supervision.

The district court found that the AFLA contemplates "one-on-one" counseling and "*teaching* by grant recipients and subcontractors" on subjects that are inseparable from religious dogma. J.S. App. 28a, 40a, 43a (emphasis in original).

Each program under the AFLA is under the control of grantees.[97] The programs all develop their own material, curriculum, counseling techniques, bibliographies, and guidelines. AFLA funds are used to pay for teachers, counselors and facilitators, including the salaries and training of religious personnel.[98] Even grantees who are funded for care grants include educational components. For example, St. Ann's care

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96 This is true of both religious and secular grantees. For example, St. Margaret's Hospital has religious statues and symbols throughout, including in delivery rooms and some examining rooms, J.A. 531; Lyon County Health Department held classes at several churches and parochial schools, such as Sacred Heart Parochial School where religious symbols were on the walls, R. 155, A., IV, 238; and Tucson Unified School District subcontracted with, among others, St. Elizabeth of Hungary Clinic and Catholic Social Services, which have religious symbols such as crucifixes and/or pictures of St. Elizabeth visible in their waiting rooms and lobbies, *id.* 281-84.

97 The United States argued before this Court in *Aguilar v. Felton*, 473 U.S. 402 (1985), that:

> The correct line [for avoiding entanglement violations], we believe, is to permit federal aid to go on an evenhanded basis to all students as long as the provision of services is *strictly supplemental* and *totally in the control of public authorities*. . . . And the vice of excessive entanglement is avoided so long as there is no mixture or overlap of jurisdictions.

See Government's brief at 47 (emphasis added).

98 Federal tax monies are used to employ religious personnel at St. Margaret's and St. Ann's and to employ personnel who did work indistinguishable from other employees working at the religious institution. R. 155, A., II, 57-59; R. 155, A., III-A, 467-70, 508, 547; R. 155, A., VI, 236-37; *see also* R. 155, A., III, 37-38, 79, 81-84; R. 155, A., IV, 23-26.

project requires Family Life Education classes, and Cities in Schools provides adolescents with educational services supported by Here's Life Washington, a religious organization which provides "[i]ndividual counseling based on Scriptural principles." J.A. 572; R. 155, A., IV, 316-17, 321-26. Moreover, entanglement occurs not only between HHS and various grantees, but between those grantees that are state or local governments and their religious participants.[99]

This Court in *Lemon* examined the "potential for involving some aspect of faith or morals in secular subjects," 403 U.S. at 617, differentiating between the degree of supervision necessary with teachers as opposed to textbooks. Unlike the one-time construction grants upheld in *Tilton* as inherently nonideological in character, 403 U.S. at 687, the AFLA programs are designed to teach morals. The danger of religious indoctrination under the AFLA is therefore present in both the teaching materials and the teachers.[100]

Reviewing a Catholic grantee's teachings on contraception more clearly involves invading the "precinct of the church" than reviewing a secular math book. The monitoring necessary to "be certain" religious indoctrination does not creep into AFLA programs cannot be compared with an annual assessment of the amount of college fees, *Hunt v. McNair*, 413 U.S. 734 (1973), or the "quick and non-judgmental" annual audits of state funds required in *Roemer*, 426 U.S. at 743. As the district court stated, ensuring that religion is not promoted

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99 For example, grantee Camden County Department of Health subcontracted with one group to build on its "linkages with several Catholic parishes" and on previous work presenting sex education programs in Catholic churches as well as public high schools. R. 155, A., IV, 185-86. Another subgrantee would provide an educational program based on one developed with the Family Life Bureau of the Diocese of Camden. *Id.* at 187, 187A-187C.

100 The Court, in *Meek v. Pittenger*, was alert to the fact that "the likelihood of inadvertent fostering of religion may be less in a remedial arithmetic class than in a medieval history seminar, but a diminished probability of impermissible conduct is not sufficient . . . ." 421 U.S. at 370-71; *see also Wolman v. Walter*, 433 U.S. 229, 244 (1977), where this Court found a different degree of danger because "diagnostic services, unlike teaching or counseling, have little or no educational content."

"would require extensive and continuous monitoring and direct oversight of every counseling session." J.S. App. 42.

C. The AFLA Compromises The Integrity Of Both Government And Religion.

The First Amendment's requirement of a separation of Church and State is intended both to protect religion from being corrupted by the state and vice versa. *See generally* M. Howe, *The Garden and the Wilderness* (1967).[101] In *Lemon*, the Court saw inherent difficulties in the "possibility of disagreement between teacher and religious authorities over the meaning of the statutory restrictions." 403 U.S. at 619. In this instance, HHS alleges that they are enforcing a grant condition ensuring that grantees do not "teach or *promote*" religion. J.A. 757. There is clearly disagreement about what constitutes "promoting" religion.[102] For example, is teaching a teenager that there are "no severe psychiatric consequences from carrying a pregnancy to term due to rape," J.A. 426, merely an accidental factual error or a deliberate attempt to promote a religious tenet against abortion? Another example occurred when a nurse midwife working in St. Margaret's AFLA program was reprimanded for contravening the hospital's religious views on sex when she answered "yes" to a teenager who asked whether she could have sex during pregnancy. J.A. 552.

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101 *See, e.g., Roemer v. Board of Pub. Works*, 426 U.S. at 775 (Stevens, J., dissenting) (remarking on "the pernicious tendency of a state subsidy to tempt religious schools to compromise their religious mission without wholly abandoning it").

102 Sex education curriculums by grantee St. Margaret's were governed by the rules of the Boston Archdiocese that required them to be "based on Catholic teaching." J.A. 608. *See* J.A. 423-24; *supra* p. 18 nn.39, 40. Its curriculums claim that natural family planning is highly effective and has no side effects, but provide only abbreviated discussion of all other methods of contraception, listing numerous complications or side-effects while failing to mention the infrequency of their occurrence. *See* R. 155, A., II, 308-19; J.A. 422-26. Dr. Laz evaluated the curriculum and concluded that the "sections on family planning and abortion are biased, misleading, and contain many medical inaccuracies. . . . The curriculum is clearly designed to promote Catholic doctrine. . . ." J.A. 531-39. St. Ann's curriculum is not based on medicine either, but on doctrine. *See* J.A. 342-43, 350-53.

Several of the religiously affiliated grantees did attempt to remove some explicit religious content from their programs. For example, shortly after Search Institute received its grant notice, Rev. Forliti sent OAPP's deputy director a copy of an explicitly religious curriculum, which was returned without comment. Prior to depositions, however, Rev. Forliti's explicit references to religion and churches were deleted. R. 125, 119-25.[103] In some cases changes created internal religious dissension.[104]

D. The AFLA Creates Political Divisiveness.

Even if political divisiveness is seen as no more than "evidence that institutional entanglement is excessive or that a government practice is perceived as an endorsement of religion," *Lynch v. Donnelly*, 465 U.S. 668, 689 (1984) (O'Connor, J. concurring), the AFLA has created such divisiveness.[105] The district court held that the AFLA would, for two reasons, "tend to incite political division along religious lines." First, the issues involved are central to religious doctrine and ones on which "religions' fundamental beliefs differ." *See supra* pp. 24-28, 35-37. Second, annual appropriations in this competitive grant scheme assure ongoing controversy and conflict.

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103 Some grantees did apparently change their religious orientation in the belief this would help retain their AFLA funds. On September 17, 1984, Dr. James Dittes, a theology professor and advisory board member of AFLA grantee, Search Institute, affirmed that the Institute was religious. J.A. 556-58. After the trial court order, on May 8, 1987, Dr. Dittes asked that Search be reclassified as secular because of "major and sweeping changes in the organization." J.A. 624-25.

104 The Catholic newspaper *The Wanderer* published an article raising concerns about the propriety of Catholic Charities funds being used, together with AFLA funds, in a program that includes teaching about contraception "and will not teach nor promote religion." Potter, "Arlington Bishop Stonewalls on Propriety of Sex-Ed Course," *The Wanderer* (Apr. 11, 1985).

105 *See Meek*, 421 U.S. at 370-73; *Lemon*, 403 U.S. at 622-24; and *Nyquist*, 413 U.S. at 796-99. The Seventh Circuit invalidated a program of subgranting federal CETA workers to parochial schools because of the political divisiveness created by a competitive scheme similar to AFLA. *Decker v. O'Donnell*, 661 F.2d 598 (7th Cir. 1980).

The fact that relatively few groups receive benefits under a government funded program[106] was identified as a warning signal of political divisiveness in *Lemon*, 403 U.S. at 623. The aid programs upheld by this Court, in contrast to the AFLA, involved fairly automatic, non-competitive grants either to both public and private entities, all school children or parents. *See, e.g., Mueller v. Allen*, 463 U.S. 388 (1983); *Roemer*, 426 U.S. 736. *See also Walz*, 397 U.S. 664 (tax exemption available across the board). AFLA funding decisions are made by the director of OAPP, whose decisions are only guided by scores given by readers.[107] Because secular grant applicants must show how they involve religious groups, they must compete for religious support and religions are given the power to influence who gets the federal grants.[108] Secular groups compete with religious groups, and certain religious groups are advantaged over others. As shown by the treatment of the University of Arkansas, *see supra* p. 31, the grant-making scheme "foster[s] the creation of political constituencies defined along religious lines." *Lynch*, 465 U.S. at 688 (O'Connor, J., concurring).

Furthermore, AFLA grants gave grantees political influence. The AFLA grant to St. Margaret's to build its religious curriculum enabled St. Margaret's to gain a foothold with the Boston public school board to develop sex education programs

106 Except for a small number of national projects, HHS had a two-per-state limit, and in fact in 1983 invited applications from the fifteen states without grantees. 48 Fed. Reg. 2917 (1983).

107 *See* 47 Fed. Reg. 8685 (1982). Ideological considerations influenced AFLA funding decisions. Sheeran, OAPP Program Officer for care and prevention grants, and Dr. Patricia Thompson, Program Officer for the AFLA research grants, both testified that Director Mecklenburg separately read them a list of organizations, including the American Bar Association, which "should not be funded by this [the Reagan] Administration." J.A. 118-19. Thompson was ordered to find a reason to avoid funding the Urban Institute, which received the second highest research score, for this reason. R. 108, 50-52.

108 For example, the OAPP explained to one applicant that it was rejected in part because "the lack of support from the Toledo Area Council of Churches weakened the proposal." R. 155, A., I-A, 505H.

for public schools. R. 185, Supp. A., 18, 23, 35-37.[109] The Charles Henderson Child Health Center used AFLA funds to lobby both the City of Troy and the Alabama House of Representatives to issue proclamations on Christianity and the family. R. 155, A., IV, 406-07.

In sum, AFLA participants' "standing in the political community" increased and the standing of others, such as the religious plaintiffs, diminished. *Lynch v. Donnelly*, 465 U.S. at 687 (O'Connor, J., concurring).

III. APPELLANTS' ALTERNATIVE THEORIES CANNOT OBSCURE THE FACT THAT THE AFLA ADVANCES RELIGION AND FOSTERS EXCESSIVE ENTANGLEMENT.

Appellants devise a variety of novel standards for constitutionality under the Establishment Clause, all designed to test aid programs that are not even before the Court. These approaches are as disturbing in their disregard of prior case law as in their disregard of the facts of this case.

A. Labeling The AFLA A "Social Welfare Program" Does Not Exempt It From Scrutiny Under The Establishment Clause.

Appellants persistently avoid the actual facts of this case and seek instead to litigate the validity of other, very different, hypothetical programs. The Establishment Clause and this Court's prior cases provide limiting principles, an answer to appellants' parade of horribles. The *Lemon* test clearly recognizes that teaching a sex education program is constitutionally different than the distribution of surplus food or sheltering the homeless.

The very term "social welfare" as used by appellants is misleading. Just what activities this phrase is meant to describe remains a mystery. Schools, including parochial schools, provide not only education as such, but also social services for

109 Funding also helped grantees to become self sustaining once funding stopped. St. Margaret's, for example, charged parochial but not public schools for its AFLA programs. R. 231, 191-92. "Enclosed is a check for $250.00 . . . through the kindness of our Pastor Reverend F.X. Turke." J.A. 427.

their students. Appellants seek to create a sharp constitutional dividing line between such schools and institutions providing "social welfare services," but this line does not exist: the AFLA, for example, funds education, sometimes in parochial schools.[110] *See supra* pp. 9-19.

Moreover, these limiting principles do not prevent religious groups from operating freely in the realms that the First Amendment sought to leave intact: individual conscience, advocacy and activity. This case does not affect the right of religious institutions to perform social welfare functions or engage in good works. It concerns only the constitutionality of government subsidization of the religious enterprise. The phrase "social welfare" cannot be made a constitutional talisman when it ignores the fundamental reality behind the phrase.

The appellants insist that this case is governed by the 1899 case of *Bradfield v. Roberts*, 175 U.S. 291 (1899). In *Bradfield*, the Board of Commissioners of the District of Columbia had made, out of general funds appropriated by Congress, a $30,000 construction grant to a Catholic hospital that had been issued a charter of incorporation by Congress in 1864. This Court saw no Establishment Clause problem in *Bradfield* because the special, limited privilege of the corporate charter was read to ensure that the hospital was not a "sectarian" institution. *Bradfield*'s emphasis on "corporate powers," later termed "highly artificial" by one Justice, is itself of dubious contemporary authority. *Everson v. Board of Educ.*, 330 U.S. 1, 43 n.35 (1947) (Rutledge, J., dissenting). This nineteenth century charter in no way resembles the boilerplate language and routine process of contemporary charters of incorporation. Moreover, there is nothing in *Bradfield* to indicate that

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110 The cases cited by the government, Gov. Br. 17, by no means support the proposition that there is a "historic partnership" of government and religious institutions. *Cf. Marsh v. Chambers*, 463 U.S. 783 (1983). All but two of the nine cases cited were decided on narrow state constitutional grounds. *Community Council v. Jordan*, 102 Ariz. 448, 432 P.2d 460 (1967), treated the state funding as payment to the child, not the institution, and cites *Everson* with *no* discussion. *Wilder v. Sugarman*, 385 F. Supp. 1013 (S.D.N.Y. 1974), and *Wilder v. Bernstein*, 645 F. Supp. 1291 (S.D.N.Y. 1986), cited by intervenors, Int. Br. 33, raise the free exercise rights of children in the context of foster care where the state is acting *in loco parentis*, *id.* at 1335, an issue not present here.

the grant would have been upheld if the hospital had been merely a private institution without corporate personality. And surely the religious grantees under AFLA are not merely "nonsectarian and secular corporation[s]."

But there is a more fundamental reason why *Bradfield* is different from this case, a reason explained by an apt concurring opinion in *Lemon* itself:

> The government may, of course, finance a hospital though it is run by a religious order, provided it is open to people of all races and creeds. [*Bradfield*] . . . The government itself could enter the hospital business; and it would, of course, make no difference if its agents who ran its hospital were Catholics, Methodists, agnostics, or whatnot. *For the hospital is not indulging in religious instruction or guidance or indoctrination.*

403 U.S. at 633 (Douglas, J., concurring) (emphasis added). The plaintiff's meagre allegations in *Bradfield* certainly did nothing to establish that the hospital was performing sectarian acts[111] or that it was "pervasively sectarian." The teaching, counseling and treatment of reproductive health matters under rigid religious dictates as subsidized by the AFLA, *see supra* pp. 19-22, are not comparable to a hospital constructing a diphtheria ward as Providence hospital was funded to do in 1899. *Government of the District of Columbia Annual Reports of the Commissioners*, 1874-1941, Report of Board of Health (1896, 1897).[112]

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111 There is no small irony that appellants seek to find authority in *Bradfield*. The hospital whose grant was upheld in *Bradfield*, Providence Hospital, is the same Providence Hospital whose "Center for Life" program funded by AFLA is one of the most blatant examples of AFLA funds impermissibly advancing religion. J.S. App. 34a.

112 In eighty-eight years, this Court has cited *Bradfield* in only thirteen cases—only six times in majority or plurality opinions interpreting the Establishment Clause—and never for any assertion more specific than that "the proposition that the Establishment Clause prohibits any program which in some manner aids an institution with a religious affiliation has consistently been rejected." *Hunt*, 413 U.S. at 743; *see also Mueller*, 463 U.S. at 393; *Roemer*, 426 U.S. at 746; *Tilton*, 403 U.S. at 679.

B. AFLA Funding Of Religious Institutions And Religious Activities Is Not Neutral.

The intervenor asserts that the proper inquiry under the Establishment Clause is, or should be, "neutrality." However alluring in the abstract, the term "neutrality" does not by itself express the goal of the Establishment Clause, nor has it determined this Court's analysis in prior cases. From the criminal law to expenditures for the public welfare, public policy is predicated on distinctions—on departures from a strict "neutrality"—and the First Amendment throws the weight of the Constitution behind one such distinction: Governments may not exercise their broad spending power to make outright grants to religious institutions that so much as risk supporting the sectarian mission of those institutions.[113]

The intervenor quotes this Court's words in *Roemer*—"Neutrality is what is required. The state must confine itself to secular objectives, and neither advance nor impede religious activity"—but omits conveniently the words immediately following:

> Of course, that principle is more easily stated than applied. The Court has taken the view that *a secular purpose and a facial neutrality may not be enough, if in fact the state is lending direct support to a religious activity.* The State may not, for example, pay for what is actually a religious education, even though it purports to be paying for a secular one, *and even though it makes its aid available to secular and religious institutions alike.*

426 U.S. at 747 (plurality opinion) (emphasis added). This, and not mere "neutrality," is the crux of the matter.

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113 There is no answer to the proposition . . . that the effect of the religious freedom Amendment to our Constitution was to take every form of propagation of religion out of the realm of things which could directly or indirectly be made public business and thereby be supported in whole or in part at taxpayers' expense. *That is a difference which the Constitution sets up between religion and almost every other subject of legislation, a difference which goes to the very root of religious freedom.* . . .

Everson, 330 U.S. at 26 (Jackson, J., dissenting) (emphasis added).

The intervenor's emphasis on equality in the receipt of material benefits,[114] which seems to regard religious institutions as mere economic competitors for government concessions, is a peculiar reading of the Establishment Clause. But the invocation of "neutrality" loses all force when one considers that the AFLA is decidedly *non*-neutral in at least four ways. First, by requiring religious involvement, the AFLA actually gives a non-neutral preference to religious organizations. Second, the AFLA is a competitive grant program, unlike the education cases in which aid was available to either all accredited institutions, all school children, or all nonpublic schools. Third, only religious organizations that adhere to certain beliefs regarding reproduction, abortion, and chastity are eligible for AFLA funding.[115] Finally, perhaps most importantly, AFLA is non-neutral in the sense that the ultimate beneficiaries, the targeted adolescents, are presented with government-sponsored, religiously dictated medical services and education, regardless of the personal religious beliefs of the adolescents. *See supra* pp. 9-22, 26-28; *Edwards v. Aguillard*, 96 L.Ed.2d 510 (1987); *Epperson v. Arkansas*, 393 U.S. 97 (1968).

IV. THE ENTIRE AFLA MUST FALL DUE TO THE UNCONSTITUTIONAL RELIGIOUS INVOLVEMENT, AND THE STATUTE MAY NOT BE SEVERED.[116]

This Court has held that the relevant inquiry in deciding

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114 The intervenor argues that the district court's judgment denies it the free exercise of religion by denying its members access to government-funded sex education consistent with their religious beliefs. Int. Br. 7. There is, however, no free exercise right to a government subsidy for religious education, *Nyquist*, 413 U.S. at 782 n.38. Moreover, even if this Court were to recognize the free exercise right asserted by intervenor, it would have to weigh that claim against the free exercise rights of all those, including patients in Catholic hospitals governed by *Religious Directives*, who were compelled to follow these *Directives* as a condition for participating in a government program. J.A. 541. *See Wisconsin v. Yoder*, 406 U.S. 205, 241 (1972) (Douglas, J., dissenting).

115 This Court has stated, "[t]he clearest command of the Establishment Clause is that one denomination cannot be officially preferred over another." *Larson v. Valente*, 456 U.S. 228, 244 (1982).

116 This cross-appeal is joined by all plaintiffs except the American Jewish Congress.

whether or not to sever an unconstitutional provision from a statute is *not* whether the statute could continue to operate absent the invalid provision, but is "whether the statute will function in a *manner* consistent with the intent of Congress." *Alaska Airlines v. Brock*, 107 S. Ct. 1476, 1480-81 (1987) (emphasis in original);[117] *see also City of New Haven v. United States*, 809 F.2d 900, 906 (D.C. Cir. 1987). This Court has also stated that when the unconstitutional and constitutional portions of a statute "are necessary parts of one system . . . the whole Act will fall with the invalidity of one clause. When there is no such connection and dependency, the Act will stand . . . ." *Huntington v. Worthen*, 120 U.S. 97, 102 (1887); *accord Field v. Clark*, 143 U.S. 649, 695-96 (1892); *see also Hill v. Wallace*, 259 U.S. 44, 70-72 (1922). The AFLA clearly does not meet these requirements for severability.

A primary reason that Congress enacted the AFLA to replace Title VI was to inject the teaching of certain religiously sensitive values about sexuality and involve religious organizations in the teaching of those values. *See supra* pp. 2-4. One of the few principal differences between the AFLA and Title VI is that the AFLA repeatedly lists religious groups as specifically desired participants. Congress added references to religious organizations at four places throughout the AFLA, making religious organizations eligible for direct AFLA grants and requiring *all* grantees to involve religious organizations in their

117 *Alaska Airlines* is the only case on which the district court relied in severing the AFLA. In *Alaska Airlines*, this Court considered whether an unconstitutional legislative veto provision could be severed from the Airline Deregulation Act. The Court severed the legislative veto, noting it was by "its very nature . . . separate from the operation of the substantive provisions of a statute," 107 S. Ct. at 1480, and covered only "insignificant" aspects of the Act, *id.* at 1482. By contrast, the Court described the Act itself as a "major change" and "fundamental redirection" in the regulation of air transportation. *Id.* at 1478.

The AFLA is factually distinguishable from the Act in *Alaska Airlines* on all of these points. The inclusion of religious organizations is interwoven throughout the AFLA, is mandated in all funded programs and was a primary reason that Congress enacted the AFLA to replace Title VI. Also, the AFLA is a small experimental program, one of approximately forty-three federal programs, guarantees or protections designed to help pregnant adolescents and their families. *See* Moore, *Adolescent Parents: Federal Programs and Policies* (Summer 1983).

programs. Thus, Congress clearly viewed the participation of religious organizations as vital to the success of AFLA programs and would not have replaced Title VI absent the religious involvement.[118]

Moreover, to the extent that the legislative intent is unclear, this Court has ruled that "if the matter is in such doubt that we are unable to say what Congress would have done omitting the unconstitutional feature, then the statute must fall." *El Paso Northeastern Ry. v. Gutierrez*, 215 U.S. 87, 97 (1909).

Courts also consider how the statute has actually operated to infer legislative intent. *See Meek v. Pittenger*, 421 U.S. at 363-65; *Sloan v. Lemon*, 413 U.S. 825, 830 (1973). The extensive involvement of religious organizations and promotion of religious beliefs in AFLA programs further demonstrate the inseparability of the religious sections in the statute. *See supra* pp. 6-24. Furthermore, because the AFLA has been unconstitutionally promoting religion for over six years, the surveillance needed to prevent the government promotion of religion under a severed AFLA would itself create unconstitutional "excessive and enduring entanglement." *Lemon*, 403 U.S. at 619.

Finally, the district court not only improperly severed language appearing throughout the statute,[119] but also in effect wrote into the Act an injunction prohibiting funding of religious organizations. J.S. App. 48a. As this Court explained in *Hill v. Wallace*, it is beyond the scope of judicial duty to ensure severability by "dissect[ing] an unconstitutional measure and refram[ing] a valid one . . . by inserting limitations it does not contain. This is legislative work beyond the power and function of the Court." 259 U.S. at 70.

118 The absence of both a severability clause and assurances that funds must be used only for secular purposes further indicates that Congress intended religion to be an inseparable part of the AFLA.

119 The district court ordered the cessation of the participation of religious organizations in the AFLA that was occurring at the time of the order. Contrary to the government's assertion, the court did not rest the order on the premise that all religious organizations are the same. Gov. Br. 31. Rather the court properly put the burden on the government to decide what is and what is not religious, as it is obliged to do in other regulatory contents. R. 303, 35-38.

CONCLUSION

For the foregoing reasons, this Court should affirm the district court's order declaring the Adolescent Family Life Act unconstitutional both on its face and as applied, and reverse the district court's order on severability.

Respectfully submitted,

JANET BENSHOOF
(Counsel of Record)
LYNN M. PALTROW
DAWN JOHNSEN
NAN D. HUNTER
RACHAEL N. PINE
American Civil Liberties Union
Foundation
132 West 43rd Street
New York, New York 10036
(212) 944-9800

BRUCE J. ENNIS, JR.
Ennis Friedman & Bersoff
1200 17th St., N.W.
Suite 400
Washington, D.C. 20053
(202) 775-8100

Attorneys for Appellees and Cross Appellants

APPENDIX

EXHIBIT A

SUBCHAPTER XX—ADOLESCENT FAMILY LIFE DEMONSTRATION PROJECTS

300z. Findings and purposes

a) The Congress finds that—

(1) In 1978, an estimated one million one hundred thousand teenagers became pregnant, more than five hundred thousand teenagers carried their babies to term, and over one-half of the babies born to such teenagers were born out of wedlock;

(2) adolescents aged seventeen and younger accounted for more than one-half of the out of wedlock births to teenagers;

(3) in a high proportion of cases, the pregnant adolescent is herself the product of an unmarried parenthood during adolescence and is continuing the pattern in her own lifestyle;

(4) it is estimated that approximately 80 per centum of unmarried teenagers who carry their pregnancies to term live with their families before and during their pregnancy and remain with their families after the birth of the child;

(5) pregnancy and childbirth among unmarried adolescents, particularly young adolescents, often results in severe adverse health, social, and economic consequences, including: a higher percentage of pregnancy and childbirth complications; a higher incidence of low birth weight babies; a higher frequency of developmental disabilities; higher infant mortality and morbidity; a decreased likelihood of completing schooling; a greater likelihood that an adolescent marriage will end in divorce; and higher risks of unemployment and welfare dependency;

(6)(A) adoption is a positive option for unmarried pregnant adolescents who are unwilling or unable to care for their children since adoption is a means of providing permanent families for such children from available approved couples who are unable or have difficulty in conceiving or carrying children of their own to term; and

(B) at present, only 4 per centum of unmarried pregnant adolescents who carry their babies to term enter into an adoption plan or arrange for their babies to be cared for by relatives or friends;

(7) an unmarried adolescent who becomes pregnant once is likely to experience recurrent pregnancies and childbearing, with increased risks;

(8)(A) the problems of adolescent premarital sexual relations, pregnancy, and parenthood are multiple and complex and are frequently associated with or are a cause of other troublesome situations in the family; and

(B) such problems are best approached through a variety of integrated and essential services provided to adolescents and their families by other family members, religious and charitable organizations, voluntary associations, and other groups in the private sector as well as services provided by publicly sponsored initiatives;

(9) a wide array of educational, health, and supportive services are not available to adolescents with such problems or to their families, or when available frequently are fragmented and thus are of limited effectiveness in discouraging adolescent premarital sexual relations and the consequences of such relations;

(10)(A) prevention of adolescent sexual activity and adolescent pregnancy depends primarily upon developing strong family values and close family ties, and since the family is the basic social unit in which the values and attitudes of adolescents concerning sexuality and pregnancy are formed, programs designed to deal with issues

of sexuality and pregnancy will be successful to the extent that such programs encourage and sustain the role of the family in dealing with adolescent sexual activity and adolescent pregnancy;

(B) Federal policy therefore should encourage the development of appropriate health, educational, and social services where such services are now lacking or inadequate, and the better coordination of existing services where they are available; and

(C) services encouraged by the Federal Government should promote the involvement of parents with their adolescent children, and should emphasize the provision of support by other family members, religious and charitable organizations, voluntary associations, and other groups in the private sector in order to help adolescents and their families deal with complex issues of adolescent premarital sexual relations and the consequences of such relations; and

(11)(A) there has been limited research concerning the societal causes and consequences of adolescent pregnancy;

(B) there is limited knowledge concerning which means of intervention are effective in mediating or eliminating adolescent premarital sexual relations and adolescent pregnancy; and

(C) it is necessary to expand and strengthen such knowledge in order to develop an array of approaches to solving the problems of adolescent premarital sexual relations and adolescent pregnancy in both urban and rural settings.

(b) Therefore, the purposes of this subchapter are—

(1) to find effective means, within the context of the family, of reaching adolescents before they become sexually active in order to maximize the guidance and support available to adolescents from parents and other family

members, and to promote self discipline and other prudent approaches to the problem of adolescent premarital sexual relations, including adolescent pregnancy;

(2) to promote adoption as an alternative for adolescent parents;

(3) to establish innovative, comprehensive, and integrated approaches to the delivery of care services for pregnant adolescents, with primary emphasis on unmarried adolescents who are seventeen years of age or under, and for adolescent parents, which shall be based upon an assessment of existing programs and, where appropriate, upon efforts to establish better coordination, integration, and linkages among such existing programs in order to—

(A) enable pregnant adolescents to obtain proper care and assist pregnant adolescents and adolescent parents to become productive independent contributors to family and community life; and

(B) assist families of adolescents to understand and resolve the societal causes which are associated with adolescent pregnancy;

(4) to encourage and support research projects and demonstration projects concerning the societal causes and consequences of adolescent premarital sexual relations, contraceptive use, pregnancy, and child rearing;

(5) to support evaluative research to identify effective services which alleviate, eliminate, or resolve any negative consequences of adolescent premarital sexual relations and adolescent childbearing for the parents, the child, and their families; and

(6) to encourage and provide for the dissemination of results, findings, and information from programs and research projects relating to adolescent premarital sexual relations, pregnancy, and parenthood.

(July 1, 1944, c. 373, Title XX, § 2001, as added Aug. 13, 1981, Pub.L. 97-35, Title IX, § 955(a), 95 Stat. 578.)

§ 300z-1. Definitions; regulations applicable

(a) For the purposes of this subchapter the term—

(1) "Secretary" means the Secretary of Health and Human Services;

(2) "eligible person" means—

(A) with regard to the provision of care services, a pregnant adolescent, an adolescent parent, or the family of a pregnant adolescent or an adolescent parent; or

(B) with regard to the provision of prevention services and referral to such other services which may be appropriate, a non-pregnant adolescent;

(3) "eligible grant recipient" means a public or nonprofit private organization or agency which demonstrates, to the satisfaction of the Secretary—

(A) in the case of an organization which will provide care services, the capability of providing all core services in a single setting or the capability of creating a network through which all core services would be provided; or

(B) in the case of an organization which will provide prevention services, the capability of providing such services;

(4) "necessary services" means services which may be provided by grantees which are—

(A) pregnancy testing and maternity counseling;

(B) adoption counseling and referral services which present adoption as an option for pregnant adolescents, including referral to licensed adoption

agencies in the community if the eligible grant recipient is not a licensed adoption agency;

(C) primary and preventive health services including prenatal and postnatal care;

(D) nutrition information and counseling;

(E) referral for screening and treatment of venereal disease;

(F) referral to appropriate pediatric care;

(G) educational services relating to family life and problems associated with adolescent premarital sexual relations, including—

(i) information about adoption;

(ii) education on the responsibilities of sexuality and parenting;

(iii) the development of material to support the role of parents as the provider of sex education; and

(iv) assistance to parents, schools, youth agencies, and health providers to educate adolescents and preadolescents concerning self-discipline and responsibility in human sexuality;

(H) appropriate educational and vocational services and referral to such services;

(I) referral to licensed residential care or maternity home services; and

(J) mental health services and referral to mental health services and to other appropriate physical health services;

(K) child care sufficient to enable the adolescent parent to continue education or to enter into employment;

(L) consumer education and homemaking;

(M) counseling for the immediate and extended family members of the eligible person;

(N) transportation;

(O) outreach services to families of adolescents to discourage sexual relations among unemancipated minors;

(P) family planning services; and

(Q) such other services consistent with the purposes of this subchapter as the Secretary may approve in accordance with regulations promulgated by the Secretary;

(5) "core services" means those services which shall be provided by a grantee, as determined by the Secretary by regulation;

(6) "supplemental services" means those services which may be provided by a grantee, as determined by the Secretary by regulation;

(7) "care services" means necessary services for the provision of care to pregnant adolescents and adolescent parents and includes all core services with respect to the provision of such care prescribed by the Secretary by regulation;

(8) "prevention services" means necessary services to prevent adolescent sexual relations, including the services described in subparagraphs (A), (D), (E), (G), (H), (M), (N), (O), and (Q) of paragraph (4);

(9) "adolescent" means an individual under the age of nineteen; and

(10) "unemancipated minor" means a minor who is subject to the control, authority, and supervision of his or her parents or guardians, as determined under State law.

(b) Until such time as the Secretary promulgates regulations pursuant to the second sentence of this subsection, the Secretary shall use the regulations promulgated under Title VI of the Health Services and Centers Amendments of 1978 which were in effect on August 13, 1981, to determine which necessary services are core services for purposes of this subchapter. The Secretary may promulgate regulations to determine which necessary services are core services for purposes of this subchapter based upon an evaluation of and information concerning which necessary services are essential to carry out the purposes of this subchapter and taking into account (1) factors such as whether services are to be provided in urban or rural areas, the ethnic groups to be served, and the nature of the populations to be served, and (2) the results of the evaluations required under section 300z-5(b) of this title. The Secretary may from time to time revise such regulations.

(July 1, 1944, c. 373, Title XX, § 2002, as added Aug. 13, 1981, Pub.L. 97-35, Title IX, § 955(a), 95 Stat. 580.)

§ 300z-2. Demonstration projects; grant authorization, etc.

(a) The Secretary may make grants to further the purposes of this subchapter to eligible grant recipients which have submitted an application which the Secretary finds meets the requirements of section 300z-5 of this title for demonstration projects which the Secretary determines will help communities provide appropriate care and prevention services in easily accessible locations. Demonstration projects shall, as appropriate, provide, supplement, or improve the quality of such services. Demonstration projects shall use such methods as will strengthen the capacity of families to deal with the sexual behavior, pregnancy, or parenthood of adolescents and to make use of support systems such as other family members, friends, religious and charitable organizations, and voluntary associations.

(b) Grants under this subchapter for demonstration projects may be for the provision of—

(1) care services;

(2) prevention services; or

(3) a combination of care services and prevention services.

(July 1, 1944, c. 373, Title XX, § 2003, as added Aug. 13, 1981, Pub.L. 97-35, Title IX, § 955(a), 95 Stat. 582.)

§ 300z-3. Uses of grants for demonstration projects for services

COVERED PROJECTS

(a) Except as provided in subsection (b) of this section, funds provided for demonstration projects for services under this subchapter may be used by grantees only to—

(1) provide to eligible persons—

(A) care services;

(B) prevention services; or

(C) care and prevention services (in the case of a grantee who is providing a combination of care and prevention services);

(2) coordinate, integrate, and provide linkages among providers of care, prevention, and other services for eligible persons in furtherance of the purposes of this subchapter;

(3) provide supplemental services where such services are not adequate or not available to eligible persons in the community and which are essential to the care of pregnant adolescents and to the prevention of adolescent premarital sexual relations and adolescent pregnancy;

(4) plan for the administration and coordination of pregnancy prevention services and programs of care for pregnant adolescents and adolescent parents which will further the objectives of this subchapter; and

(5) fulfill assurances required for grant approval by section 300z-5 of this title.

FAMILY PLANNING SERVICES; AVAILABILITY IN COMMUNITY

(b)(1) No funds provided for a demonstration project for services under this subchapter may be used for the provision of family planning services (other than counseling and referral services) to adolescents unless appropriate family planning services are not otherwise available in the community.

(2) Any grantee who receives funds for a demonstration project for services under this subchapter and who, after determining under paragraph (1) that appropriate family planning services are not otherwise available in the community, provides family planning services (other than counseling and referral services) to adolescents may only use funds provided under this subchapter for such family planning services if all funds received by such grantee from all other sources to support such family planning services are insufficient to support such family planning services.

FEES FOR SERVICES: CRITERIA

(c) Grantees who receive funds for a demonstration project for services under this subchapter shall charge fees for services pursuant to a fee schedule approved by the Secretary as a part of the application described in section 300z-5 of this title which bases fees charged by the grantee on the income of the eligible person or the parents or legal guardians of the eligible person and takes into account the difficulty adolescents face in obtaining resources to pay for services. A grantee who receives funds for a demonstration project for services under this subchapter may not, in any case, discriminate with regard to the provision of services to any individual because of that individual's inability to provide payment for such services, except that in determining the ability of an unemancipated minor to provide payment for services, the income of the family of an unemancipated minor shall be considered in determining the ability of such minor to make such payments unless the parents or

guardians of the unemancipated minor refuse to make such payments.

(July 1, 1944, c. 373, Title XX, § 2004, as added Aug. 13, 1981, Pub.L. 97-35, Title IX, § 955(a), 95 Stat. 583.)

§ 300z-4. Grants for demonstration projects for services

PRIORITIES

(a) In approving applications for grants for demonstration projects for services under this subchapter, the Secretary shall give priority to applicants who—

(1) serve an area where there is a high incidence of adolescent pregnancy;

(2) serve an area with a high proportion of low-income families and where the availability of programs of care for pregnant adolescents and adolescent parents is low;

(3) show evidence—

(A) in the case of an applicant who will provide care services, of having the ability to bring together a wide range of needed core services and, as appropriate, supplemental services in comprehensive single-site projects, or to establish a well-integrated network of such services (appropriate for the target population and geographic area to be served including the special needs of rural areas) for pregnant adolescents or adolescent parents; or

(B) in the case of an applicant who will provide prevention services, of having the ability to provide prevention services for adolescents and their families which are appropriate for the target population and the geographic area to be served, including the special needs of rural areas;

(4) will utilize to the maximum extent feasible existing available programs and facilities such as neighborhood

and primary health care centers, maternity homes which provide or can be equipped to provide services to pregnant adolescents, agencies serving families, youth, and children with established programs of service to pregnant adolescents and vulnerable families, licensed adoption agencies, children and youth centers, maternal and infant health centers, regional rural health facilities, school and other educational programs, mental health programs, nutrition programs, recreation programs, and other ongoing pregnancy prevention services and programs of care for pregnant adolescents and adolescent parents;

(5) make use, to the maximum extent feasible, of other Federal, State, and local funds, programs, contributions, and other third-party reimbursements;

(6) can demonstrate a community commitment to the program by making available to the demonstration project non-Federal funds, personnel, and facilities;

(7) have involved the community to be served, including public and private agencies, adolescents, and families, in the planning and implementation of the demonstration project; and

(8) will demonstrate innovative and effective approaches in addressing the problems of adolescent premarital sexual relations, pregnancy, or parenthood, including approaches to provide pregnant adolescents with adequate information about adoption.

FACTORS TO BE CONSIDERED IN MAKING GRANTS; SPECIAL NEEDS OF RURAL AREAS

(b)(1) The amount of a grant for a demonstration project for services under this subchapter shall be determined by the Secretary, based on factors such as the incidence of adolescent pregnancy in the geographic area to be served, and the adequacy of pregnancy prevention services and programs of care for pregnant adolescents and adolescent parents in such area.

(2) In making grants for demonstration projects for services under this subchapter, the Secretary shall consider the special needs of rural areas and, to the maximum extent practicable, shall distribute funds taking into consideration the relative number of adolescents in such areas in need of such services.

DURATION: FEDERAL SHARE

(c)(1) A grantee may not receive funds for a demonstration project for services under this subchapter for a period in excess of 5 years.

(2)(A) Subject to paragraph (3), a grant for a demonstration project for services under this subchapter may not exceed—

(i) 70 per centum of the costs of the project for the first and second years of the project;

(ii) 60 per centum of such costs for the third year of the project;

(iii) 50 per centum of such costs for the fourth year of the project; and

(iv) 40 per centum of such costs for the fifth year of the project.

(B) Non-Federal contributions required by subparagraph (A) may be in cash or in kind, fairly evaluated, including plant, equipment, or services.

(3) The Secretary may waive the limitation specified in paragraph (2)(A) for any year in accordance with criteria established by regulation.

(July 1, 1944, c. 373, Title XX, § 2005, as added Aug. 13, 1981, Pub.L. 97-35, Title IX, § 955(a), 95 Stat. 584.)

§ 300z-5. Requirements for applications

FORM, CONTENT, AND ASSURANCES

(a) An application for a grant for a demonstration project for services under this subchapter shall be in such form and contain such information as the Secretary may require, and shall include—

(1) an identification of the incidence of adolescent pregnancy and related problems;

(2) a description of the economic conditions and income levels in the geographic area to be served;

(3) a description of existing pregnancy prevention services and programs of care for pregnant adolescents and adolescent parents (including adoption services), and including where, how, by whom, and to which population groups such services are provided, and the extent to which they are coordinated in the geographic area to be served;

(4) a description of the major unmet needs for services for adolescents at risk of initial or recurrent pregnancies and an estimate of the number of adolescents not being served in the area;

(5)(A) in the case of an applicant who will provide care services, a description of how all core services will be provided in the demonstration project using funds under this subchapter or will otherwise be provided by the grantee in the area to be served, the population to which such services will be provided, how such services will be coordinated, integrated, and linked with other related programs and services and the source or sources of funding of such core services in the public and private sectors; and

(B) in the case of an applicant who will provide prevention services, a description of the necessary services to be provided and how the applicant will provide such services;

(6) a description of the manner in which adolescents needing services other than the services provided directly by the applicant will be identified and how access and appropriate referral to such other services (such as medicaid; licensed adoption agencies; maternity home services; public assistance; employment services; child care services for adolescent parents; and other city, county, and State programs related to adolescent pregnancy) will be provided, including a description of a plan to coordinate such other services with the services supported under this subchapter;

(7) a description of the applicant's capacity to continue services as Federal funds decrease and in the absence of Federal assistance;

(8) a description of the results expected from the provision of services, and the procedures to be used for evaluating those results;

(9) a summary of the views of public agencies, providers of services, and the general public in the geographic area to be served, concerning the proposed use of funds provided for a demonstration project for services under this subchapter and a description of procedures used to obtain those views, and, in the case of applicants who propose to coordinate services adminstered by a State, the written comments of the appropriate State officials responsible for such services;

(10) assurances that the applicant will have an ongoing quality assurance program;

(11) assurances that, where appropriate, the applicant shall have a system for maintaining the confidentiality of patient records in accordance with regulations promulgated by the Secretary;

(12) assurances that the applicant will demonstrate its financial responsibility by the use of such accounting procedures and other requirements as may be prescribed by the Secretary;

(13) assurances that the applicant (A) has or will have a contractual or other arrangement with the agency of the State (in which the applicant provides services) that administers or supervises the administration of a State plan approved under title XIX of the Social Security Act for the payment of all or a part of the applicant's costs in providing health services to persons who are eligible for medical assistance under such a State plan, or (B) has made or will make every reasonable effort to enter into such an arrangement;

(14) assurances that the applicant has made or will make and will continue to make every reasonable effort to collect appropriate reimbursement for its costs in providing health services to persons who are entitled to benefits under title V of the Social Security Act, to medical assistance under a State plan approved under title XIX of such Act, or to assistance for medical expenses under any other public assistance program or private health insurance program;

(15) assurances that the applicant has or will make and will continue to make every reasonable effort to collect appropriate reimbursement for its costs in providing services to persons entitled to services under parts B and E of title IV and title XX of the Social Security Act;

(16)(A) a description of—

(i) the schedule of fees to be used in the provision of services, which shall comply with section 300z-3(c) of this title and which shall be designed to cover all reasonable direct and indirect costs incurred by the applicant in providing services; and

(ii) a corresponding schedule of discounts to be applied to the payment of such fees, which shall comply with section 300z-3(c) of this title and which shall be adjusted on the basis of the ability of the eligible person to pay;

(B) assurances that the applicant has made and will continue to make every reasonable effort—

(i) to secure from eligible persons payment for services in accordance with such schedules;

(ii) to collect reimbursement for health or other services provided to persons who are entitled to have payment made on their behalf for such services under any Federal or other government program or private insurance program; and

(iii) to seek such reimbursement on the basis of the full amount of fees for services without application of any discount; and

(C) assurances that the applicant has submitted or will submit to the Secretary such reports as the Secretary may require to determine compliance with this paragraph;

(17) assurances that the applicant will make maximum use of funds available under subchapter VIII of this chapter;

(18) assurances that the acceptance by any individual of family planning services or family planning information (including educational materials) provided through financial assistance under this subchapter shall be voluntary and shall not be a prerequisite to eligibility for or receipt of any other service furnished by the applicant;

(19) assurances that fees collected by the applicant for services rendered in accordance with this subchapter shall be used by the applicant to further the purposes of this subchapter;

(20) assurances that the applicant, if providing both prevention and care services will not exclude or discriminate against any adolescent who receives prevention services and subsequently requires care services as a pregnant adolescent;

(21) a description of how the applicant will, as appropriate in the provision of services—

(A) involve families of adolescents in a manner which will maximize the role of the family in the solution of problems relating to the parenthood or pregnancy of the adolescent;

(B) involve religious and charitable organizations, voluntary associations, and other groups in the private sector as well as services provided by publicly sponsored initiatives;

(22)(A) assurances that—

(i) except as provided in subparagraph (B) and subject to clause (ii), the applicant will notify the parents or guardians of any unemancipated minor requesting services from the applicant and, except as provided in subparagraph (C), will obtain the permission of such parents or guardians with respect to the provision of such services; and

(ii) in the case of a pregnant unemancipated minor requesting services from the applicant, the applicant will notify the parents or guardians of such minor under clause (i) within a reasonable period of time;

(B) assurances that the applicant will not notify or request the permission of the parents or guardian of any unemancipated minor without the consent of the minor—

(i) who solely is requesting from the applicant pregnancy testing or testing or treatment for venereal disease;

(ii) who is the victim of incest involving a parent; or

(iii) if an adult sibling of the minor or an adult aunt, uncle, or grandparent who is related to the minor by blood certifies to the grantee that notification of the parents or guardians of such minor would result in physical injury to such minor; and

(C) assurances that the applicant will not require, with respect to the provision of services, the permission of the parents or guardians of any pregnant unemancipated minor if such parents or guardians are attempting to compel such minor to have an abortion;

(23) assurances that primary emphasis for services supported under this subchapter shall be given to adolescents seventeen and under who are not able to obtain needed assistance through other means;

(24) assurances that funds received under this subchapter shall supplement and not supplant funds received from any other Federal, State, or local program or any private sources of funds; and

(25) a plan for the conduct of, and assurances that the applicant will conduct, evaluations of the effectiveness of the services supported under this subchapter in accordance with subsection (b) of this section.

EVALUATIONS: AMOUNT, CONDUCT, AND TECHNICAL ASSISTANCE

(b)(1) Each grantee which receives funds for a demonstration project for services under this subchapter shall expend at least 1 per centum but not in excess of 5 per centum of the amounts received under this subchapter for the conduct of evaluations of the services supported under this subchapter. The Secretary may, for a particular grantee upon good cause shown, waive the provisions of the preceding sentence with respect to the amounts to be expended on evaluations, but may not waive the requirement that such evaluations be conducted.

(2) Evaluations required by paragraph (1) shall be conducted by an organization or entity which is independent of the grantee providing services supported under this subchapter. To assist in conducting the evaluations required by paragraph (1), each grantee shall develop a working relationship with a college or university located in the grantee's State which will provide or assist in providing monitoring and evaluation of services supported under this subchapter unless no college or university in the grantee's State is willing or has the capacity to provide or assist in providing such monitoring and assistance.

(3) The Secretary may provide technical assistance with respect to the conduct of evaluations required under this subsection to any grantee which is unable to develop a working relationship with a college or university in the applicant's State for the reasons described in paragraph (2).

REPORTS

(c) Each grantee which receives funds for a demonstration project for services under this subchapter shall make such reports concerning its use of Federal funds as the Secretary may require. Reports shall include, at such times as are considered appropriate by the Secretary, the results of the evaluations of the services supported under this subchapter.

NOTIFICATION OF PARENTS; DEFINITION

(d)(1) A grantee shall periodically notify the Secretary of the exact number of instances in which a grantee does not notify the parents or guardians of a pregnant unemancipated minor under subsection (a)(22)(B)(iii) of this section.

(2) For purposes of subsection (a)(22)(B)(iii) of this section, the term "adult" means an adult as defined by State law.

SUBMISSION OF APPLICATIONS TO GOVERNOR; COMMENTS BY GOVERNOR

(e) Each applicant shall provide the Governor of the State in which the applicant is located a copy of each application

submitted to the Secretary for a grant for a demonstration project for services under this subchapter. The Governor shall submit to the applicant comments on any such application within the period of sixty days beginning on the day when the Governor receives such copy. The applicant shall include the comments of the Governor with such application.

AVAILABILITY OF CORE SERVICES

(f) No application submitted for a grant for a demonstration project for care services under this subchapter may be approved unless the Secretary is satisfied that core services shall be available through the applicant within a reasonable time after such grant is received.

(July 1, 1944, c. 373, Title XX, § 2006, as added Aug. 13, 1981, Pub.L. 97-35, Title IX, § 955(a), 95 Stat. 585.)

§ 300z-6. Coordination of programs

(a) The Secretary shall coordinate Federal policies and programs providing services relating to the prevention of adolescent sexual relations and initial and recurrent adolescent pregnancies and providing care services for pregnant adolescents. In achieving such coordination, the Secretary shall—

(1) require grantees who receive funds for demonstration projects for services under this subchapter to report periodically to the Secretary concerning Federal, State, and local policies and programs that interfere with the delivery of and coordination of pregnancy prevention services and other programs of care for pregnant adolescents and adolescent parents;

(2) provide technical assistance to facilitate coordination by State and local recipients of Federal assistance;

(3) review all programs administered by the Department of Health and Human Services which provide prevention services or care services to determine if the policies of such programs are consistent with the policies

of this subchapter, consult with other departments and agencies of the Federal Government who administer programs that provide such services, and encourage such other departments and agencies to make recommendations, as appropriate, for legislation to modify such programs in order to facilitate the use of all Government programs which provide such services as a basis for delivery of more comprehensive prevention services and more comprehensive programs of care for pregnant adolescents and adolescent parents;

(4) give priority in the provision of funds, where appropriate, to applicants using single or coordinated grant applications for multiple programs; and

(5) give priority, where appropriate, to the provision of funds under Federal programs administered by the Secretary (other than the program established by this subchapter) to projects providing comprehensive prevention services and comprehensive programs of care for pregnant adolescents and adolescent parents.

(b) Any recipient of a grant for a demonstration project for services under this subchapter shall coordinate its activities with any other recipient of such a grant which is located in the same locality.

(July 1, 1944, c. 373, Title XX, § 2007, as added Aug. 13, 1981, Pub.L. 97-35, Title IX, § 955(a), 95 Stat. 589.)

§ 300z-7. Research

GRANTS AND CONTRACTS; DURATION, RENEWAL; AMOUNT

(a)(1) The Secretary may make grants and enter into contracts with public agencies or private organizations or institutions of higher education to support the research and dissemination activities described in paragraphs (4), (5), and (6) of section 300z(b) of this title.

(2) The Secretary may make grants or enter into contracts under this section for a period of one year. A grant or contract under this section for a project may be renewed for four additional one-year periods, which need not be consecutive.

(3) A grant or contract for any one-year period under this section may not exceed $100,000 for the direct costs of conducting research or dissemination[1] activities under this section and may include such additional amounts for the indirect costs of conducting such activities as the Secretary determines appropriate. The Secretary may waive the preceding sentence with respect to a specific project if he determines that—

(A) exceptional circumstances warrant such waiver and that the project will have national impact; or

(B) additional amounts are necessary for the direct costs of conducting limited demonstration projects for the provision of necessary services in order to provide data for research carried out under this subchapter.

(4) The amount of any grant or contract made under this section may remain available for obligation or expenditure after the close of the one-year period for which such grant or contract is made in order to assist the recipient in preparing the report required by subsection (f)(1) of this section.

SCOPE OF PERMISSIBLE ACTIVITIES

(b)(1) Funds provided for research under this section may be used for descriptive or explanatory surveys, longitudinal studies, or limited demonstration projects for services that are for the purpose of increasing knowledge and understanding of the matters described in paragraphs (4) and (5) of section 300z(b) of this title.

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1 So in original. Probably should be "dissemination".

(2) Funds provided under this section may not be used for the purchase or improvement of land, or the purchase, construction, or permanent improvement (other than minor remodeling) of any building or facility.

APPLICATIONS

(c) The Secretary may not make any grant or enter into any contract to support research or dissemination activities under this section unless—

(1) the Secretary has received an application for such grant or contract which is in such form and which contains such information as the Secretary may by regulation require;

(2) the applicant has demonstrated that the applicant is capable of conducting one or more of the types of research or dissemination activities described in paragragh (4), (5), or (6) of section 300z(b) of this title; and

(3) in the case of an application for a research project, the panel established by subsection (e)(2) of this section has determined that the project is of scientific merit.

COORDINATION WITH NATIONAL INSTITUTES OF HEALTH

(d) The Secretary shall, where appropriate, coordinate research and dissemination activities carried out under this section with research and dissemination activities carried out by the National Institutes of Health.

REVIEW OF APPLICATIONS FOR GRANTS AND CONTRACTS; ESTABLISHMENT OF REVIEW PANEL

(e)(1) The Secretary shall establish a system for the review of applications for grants and contracts under this section. Such system shall be substantially similar to the system for scientific peer review of the National Institutes of Health and shall meet the requirements of paragraphs (2) and (3).

(2) In establishing the system required by paragraph (1), the Secretary shall establish a panel to review applications under this section. Not more than 25 per centum of the members of the panel shall be physicians. The panel shall meet as often as may be necessary to facilitate the expeditious review of applications under this section, but not less than once each year. The panel shall review each project for which an application is made under this section, evaluate the scientific merit of the project, determine whether the project is of scientific merit, and make recommendations to the Secretary concerning whether the application for the project should be approved.

(3) The Secretary shall make grants under this section from among the projects which the panel established by paragraph (2) has determined to be of scientific merit and may only approve an application for a project if the panel has made such determination with respect to such a project. The Secretary shall make a determination with respect to an application within one month after receiving the determinations and recommendations of such panel with respect to the application.

REPORTS

(f)(1)(A) The recipient of a grant or contract for a research project under this section shall prepare and transmit to the Secretary a report describing the results and conclusions of such research. Except as provided in subparagraph (B), such report shall be transmitted to the Secretary not later than eighteen months after the end of the year for which funds are provided under this section. The recipient may utilize reprints of articles published or accepted for publication in professional journals to supplement or replace such report if the research contained in such articles was supported under this section during the year for which the report is required.

(B) In the case of any research project for which assistance is provided under this section for two or more consecutive one-year periods, the recipient of such assistance shall prepare and transmit the report required by subparagraph (A) to the Secre-

tary not later than twelve months after the end of each one-year period for which such funding is provided.

(2) Recipients of grants and contracts for dissemination under this section shall submit to the Secretary such reports as the Secretary determines appropriate.

COLLECTION OF SURVEY DATA USED PRIMARILY FOR GENERATION OF NATIONAL POPULATION ESTIMATES

(g) In carrying out functions relating to the conduct and support of research under this section, the Secretary shall not be subject to the provisions of chapter 35 of Title 44, except with respect to the collection of survey data which primarily will be used for the generation of national population estimates.

(July 1, 1944, c. 373, Title XX, § 2008, as added Aug. 13, 1981, Pub.L. 97-35, Title IX, § 955(a), 95 Stat. 589.)

§ 300z-8. Evaluation and administration

(a) Of the funds appropriated under this subchapter, the Secretary shall reserve not less than 1 per centum and not more than 3 per centum for the evaluation of activities carried out under this subchapter. The Secretary shall submit to the appropriate committees of the Congress a summary of each evaluation conducted under this section.

(b) The officer or employee of the Department of Health and Human Services designated by the Secretary tc carry out the provisions of this subchapter shall report directly to the Assistant Secretary for Health with respect to the activities of such officer or employee in carrying out such provisions.

(July 1, 1944, c. 373, Title XX, § 2009, as added Aug. 13, 1981, Pub.L. 97-35, Title IX, § 955(a), 95 Stat. 591.)

§ 300z-9. Authorization of appropriations

(a) For the purpose of carrying out this subchapter, there are authorized to be appropriated $30,000,000 for the fiscal year

ending September 30, 1982, $30,000,000 for the fiscal year ending September 30, 1983, and $30,000,000 for the fiscal year ending September 30, 1984.

(b) At least two-thirds of the amounts appropriated to carry out this subchapter shall be used to make grants for demonstration projects for services.

(c) Not more than one-third of the amounts specified under subsection (b) of this section for use for grants for demonstration projects for services shall be used for grants for demonstration projects for prevention services.

(July 1, 1944, c. 373, Title XX, § 2010, as added Aug. 13, 1981, Pub.L. 97-35, Title IX, § 955(a), 95 Stat. 591.)

§ 300z-10. Restrictions

(a) Grants or payments may be made only to programs or projects which do not provide abortions or abortion counseling or referral, or which do not subcontract with or make any payment to any person who provides abortions or abortion counseling or referral, except that any such program or project may provide referral for abortion counseling to a pregnant adolescent if such adolescent and the parents or guardians of such adolescent request such referral; and grants may be made only to projects or programs which do not advocate, promote, or encourage abortion.

(b) The Secretary shall ascertain whether programs or projects comply with subsection (a) of this section and take appropriate action if programs or projects do not comply with such subsection, including withholding of funds.

(July 1, 1944, c. 373, Title XX, § 2011, as added Aug. 13, 1981, Pub.L. 97-35, Title IX, § 955(a), 95 Stat. 592.)

EXHIBIT B

TITLE VI—GRANT PROGRAM

FINDINGS AND PURPOSES

SEC. 601. (a) The Congress finds that—

(1) adolescents are at a high risk of unwanted pregnancy;

(2) in 1975, almost 1,000,000 adolescents became pregnant and nearly 600,000 carried their babies to term;

(3) pregnancy and childbirth among adolescents, particularly young adolescents, often results in severe adverse health, social, and economic consequences, including: a higher percentage of pregnancy and childbirth complications; a higher incidence of low-birth-weight babies; a higher frequency of developmental disabilities; higher infant mortality and morbidity; a decreased likelihood of completing schooling; a greater likelihood that adolescent marriage will end in divorce; and higher risks of unemployment and welfare dependency;

(4) an adolescent who becomes pregnant once is likely to experience rapid repeat pregnancies and childbearing, with increased risks;

(5) the problems of adolescent pregnancy and parenthood are multiple and complex and are best approached through a variety of integrated and essential services;

(6) such services, including a wide array of educational and supportive services, often are not available to the adolescents who need them, or are available but fragmented and thus of limited effectiveness in preventing pregnancies and future welfare dependency; and

(7) Federal policy therefor should encourage the development of appropriate health, educational, and social services where they are now lacking or inadequate, and

the better coordination of existing services where they are available in order to prevent unwanted early and repeat pregnancies and to help adolescents become productive, independent contributors to family and community life.

(b) Therefore, the purposes of this Act are—

(1) to establish better coordination, integration, and linkages among existing programs in order to expand and improve the availability of, and access to, needed comprehensive community services which assist in preventing unwanted initial and repeat pregnancies among adolescents, enable pregnant adolescents to obtain proper care and assist pregnant adolescents and adolescent parents to become productive independent contributors to family and community life, with primary emphasis on services to adolescents who are 17 years of age and under and are pregnant or who are parents;

(2) to expand the availability of such services that are essential to that objective; and

(3) to promote innovative, comprehensive, and integrated approaches to the delivery of such services.

DEFINITIONS

SEC. 602. For the purposes of this Act, the term—

(1) "Secretary" means the Secretary of the Department of Health, Education, and Welfare;

(2) "eligible person" means—

(A) with regard to the provision of all necessary core services and such necessary supplemental services as may be available, a pregnant adolescent or an adolescent parent; or

(B) with regard to the provision of the services described in paragraphs (4)(A), (4)(B), and (4)(G)

and referral to such other services which may be appropriate, a nonpregnant adolescent;

(3) "eligible grant recipient" means a public or nonprofit private organization or agency which demonstrates, to the satisfaction of the Secretary, the capability of providing in a single setting all core services or the capability of creating a network through which all core services would be provided;

(4) "core services" means those services which shall be provided by all grantees which are—

(A) pregnancy testing, maternity counseling, and referral services;

(B) family planning services, except that such services for nonpregnant adolescents shall be limited to counseling and referral unless suitable and appropriate family planning services are not otherwise available in the community;

(C) primary and preventive health services including pre- and post-natal care;

(D) nutrition information and counseling;

(E) referral for screening and treatment of venereal disease;

(F) referral to appropriate pediatric care;

(G) educational services in sexuality and family life (including sex education), and including family planning information;

(H) referral to appropriate educational and vocational services;

(I) adoption counseling and referral services; and

(J) referral to other appropriate health services.

(5) "supplemental services" means those services which may be provided and are—

(A) child care sufficient to enable the adolescent parent to continue her education or to enter into employment;

(B) consumer education and homemaking;

(C) counseling for extended family members of the eligible person;

(D) transportation; and

(E) such other services consistent with the purposes of this Act as the Secretary may approve in accordance with regulations promulgated by the Secretary;

(6) "adolescent parent" means a parent under the age of 21.

AUTHORITY TO MAKE GRANTS

SEC. 603. The Secretary may make grants to further the purposes of this Act to eligible grant recipients which have submitted an application which the Secretary finds meets the requirements of section 606 for projects which the Secretary determines will help communities provide core and supplemental services in easily accessible locations, assure a continuity of services and appropriate assistance, and coordinate, integrate, and establish linkages among such services. Projects shall, as appropriate, provide, supplement, or improve the quality of such services, and in providing services, give primary emphasis to adolescents who are 17 years of age or under and are pregnant or who are parents.

USES OF GRANTS

SEC. 604. (a) Funds provided under this Act may be used by grantees only to—

(1) provide core services to eligible persons;

(2) coordinate, integrate, and provide linkages among providers of core, supplemental, and other services for eligible persons in furtherance of the purposes of this Act;

(3) provide supplemental services where such services are not adequate or not available to eligible persons in the community and which are essential to the care of pregnant adolescents and to the prevention of adolescent pregnancy;

(4) plan for the administration and coordination of pregnancy prevention and pregnancy-related services for adolescents (including family life and sex education), which will further the objectives of this Act; and

(5) fulfill assurances required for grant approval by section 606.

(b) Grantees shall charge fees for services only pursuant to a fee schedule, approved by the Secretary as a part of the application described in section 606, which bases fees charged by the grantee on the income of the eligible person or the parents or legal guardians of the eligible person and takes into account the difficulty adolescents face in obtaining resources to pay for services. In no case may a grantee discriminate with regard to the provision of services to any individual because of that individual's inability to provide payment for such services.

PRIORITIES, AMOUNTS, AND DURATION OF GRANTS

SEC. 605. (a) In approving applications for grants under this Act, the Secretary shall give priority to applicants who—

(1) serve an area where there is a high incidence of adolescent pregnancy;

(2) serve an area where the incidence of low-income families is high and where the availability of pregnancy-related services is low;

(3) show evidence of having the ability to bring together a wide range of needed care and, as appropriate, supplemental services in comprehensive single-site projects, or to establish a well-integrated network of such services (appropriate for the target population and geographic area to be served including the special needs of rural areas) for adolescents at risk of initial or repeat pregnancies;

(4) will utilize to the maximum extent feasible, existing available programs and facilities such as neighborhood and primary health care centers, family planning clinics, children and youth centers, maternal and infant health centers, regional rural health facilities, school and other educational programs, mental health programs, nutrition programs, recreation programs, and other ongoing pregnancy prevention and pregnancy-related services;

(5) make use, to the maximum extent feasible, of other Federal, State, and local funds, programs, contributions, and other third-party reimbursements;

(6) can demonstrate a community commitment to the program by making available to the project non-Federal funds, personnel, and facilities; and

(7) have involved the community to be served, including public and private agencies, adolescents, and families, in the planning and implementation of the project.

(b)(1) The amount of a grant under this Act shall be determined by the Secretary, based on factors such as the incidence of adolescent pregnancy in the geographic area to be served, and the adequacy of pregnancy prevention and pregnancy-related services in the area to be served.

(2) In making grants under this Act, the Secretary shall consider the special needs of rural areas and, to the maximum extent practicable, shall distribute funds in consideration of the relative number of adolescents in such areas in need of such services.

(c)(1) A grantee may not receive funds under this Act for a period in excess of 5 years.

(2) Subject to paragraph (3), a grant made under this Act may not exceed 70 percent of the costs of a project assisted under this Act for the first and second years of the project. In each year succeeding the second year of the project the amount of the Federal grant under this Act shall decrease by no less than 10 percent of the amount of the Federal grant under this Act in the preceding year.

(3) The Secretary may waive the limitation specified in paragraph (2) in any year in accordance with criteria established by regulation.

REQUIREMENTS FOR GRANT APPROVAL

SEC. 606. (a) An application for a grant under this Act shall be in such form and contain such information as the Secretary may require, and shall include—

(1) an identification of the incidence of adolescent pregnancy and related problems;

(2) a description of the economic conditions and income levels in the geographic area to be served;

(3) a description of existing pregnancy prevention and pregnancy-related services (including family life and sex education), and including where, how, by whom and to whom they are provided, and the extent to which they are coordinated in the geographic area to be served;

(4) a description of the major unmet needs for services for adolescents at risk of initial or repeat pregnancies, the number of adolescents currently served in the area, and the number of adolescents not being served in the area;

(5) a description of how all of the core services will be provided in the project using funds under this Act or otherwise provided by the grantee, to whom they will be provided, how they will be coordinated, integrated, and

linked with other related programs and services and the source or sources of funding of such core services;

(6) a description of how adolescents needing services other than those provided directly by the grantee will be identified and how access and appropriate referral to those services (such as medicaid; public assistance; employment services; child care services for adolescent parents; and other city, county, and State programs related to adolescent pregnancy) will be provided including a description of the plan to coordinate such services with activities funded under this Act;

(7) a description of any fee schedule to be used for any services provided directly by the grantee and the method by which it was derived, together with assurances that the applicant will make every reasonable effort to collect reimbursement for its costs in providing services to persons who are entitled to have payment made on their behalf for such services under any Federal or other government program or private insurance program;

(8) a description of the grantee's capacity to continue services as Federal funds decrease and in the absence of Federal assistance;

(9) a description of the results expected from the provision of services and activities, and the procedures to be used for evaluating those results;

(10) a summary of the views of public agencies, providers of services, and the general public in the geographic area to be served, of the proposed use of the funds provided under a grant provided under this Act and a description of procedures used to obtain those views, and, in the case of applicants who propose to coordinate services administered by a State, the written comments of the appropriate State officials responsible for such services;

(11) assurances that the applicant will have an ongoing quality assurance program;

(12) assurances that the applicant shall have a system for maintaining the confidentiality of patient records in accordance with regulations promulgated by the Secretary;

(13) assurances that the applicant will demonstrate its financial responsibility by the use of such accounting procedures and other requirements as may be prescribed by the Secretary;

(14) assurances that the applicant (A) has or will have a contractual or other arrangement with the agency of the State, in which it provides services, which administers or supervises the administration of a State plan approved under title XIX of the Social Security Act for the payment of all or a part of the applicant's costs in providing health services to persons who are eligible for medical assistance under such a State plan, or (B) has made or will make every reasonable effort to enter into such an arrangement;

(15) assurances that the applicant has made or will make and will continue to make every reasonable effort to collect appropriate reimbursement for its costs in providing health services to persons who are entitled to benefits under title V of the Social Security Act, to medical assistance under a State plan approved under title XIX of such Act, or to assistance for medical expenses under any other public assistance program or private health insurance program;

(16) assurances that the applicant has or will make and will continue to make every reasonable effort to collect appropriate reimbursement for its costs in providing services to persons entitled to services under title XX of the Social Security Act;

(17) assurances that the applicant (A) has prepared a schedule of fees or payments for the provision of its

services designed to cover its reasonable costs of operation and a corresponding schedule of discounts to be applied to the payment of such fees or payments, which discounts are adjusted on the basis of the patient's ability to pay, (B) has made and will continue to make every reasonable effort (i) to secure from patients payment for services in accordance with such schedules, and (ii) to collect reimbursement for health or other services on the basis of the full amount of fees and payments for such services without application of any discount, and (C) has submitted to the Secretary such reports as he may require to determine compliance with this paragraph;

(18) assurances that the applicant will make maximum use of funds available under title X of the Public Health Service Act;

(19) assurances that the acceptance by any individual of family planning services or family planning or population growth information (including educational materials) provided through financial assistance under this title shall be voluntary and shall not be a prerequisite to eligibility for or receipt of any other service furnished by the applicant;

(20) assurances that fees collected by the applicant for services rendered in accordance with this Act shall be used by the applicant to further the purposes of this Act;

(21) assurances that unemancipated minors requesting services from the applicant will be encouraged, whenever feasible, to consult with their parents with respect to such services;

(22) assurances that all pregnant adolescents receiving services will be informed of the availability of counseling (either by the entity providing core services or through a referral agreement with such other entity which provides such counseling) on all options, regarding her pregnancy;

(23) assurances that primary emphasis for services paid for with funds under this Act shall be given to pregnant adolescents and adolescent parents 17 and under who are not able to obtain needed assistance through other means; and

(24) assurances that funds received under this Act shall not supplant funds received from any other Federal, State, or local program or any private sources of funds.

(b) Each grantee which participates in the program established by this title shall make such reports concerning its use of Federal funds as the Secretary may require. Reports shall include the impact the project has had on reducing the rate of first and repeat pregnancies among adolescents, and the effect on factors usually associated with welfare dependency.

(c) The Secretary shall provide the Governor of each State copies of applications received for grants under this Act from applicants within such State. The Governor shall have a period of 60 days from receipt of such copies to review and submit comments to the Secretary.

(d) No application submitted for a grant under this Act may be approved unless the Secretary is satisfied that core services shall be available through the grantee within a reasonable time after such grant is received.

AUTHORIZATION OF APPROPRIATIONS

SEC. 607. For the purpose of carrying out this title, there are authorized to be appropriated $50,000,000 for the fiscal year ending September 30, 1979, $65,000,000 for the fiscal year ending September 30, 1980 and $75,000,000 for the fiscal year ending September 30, 1981.

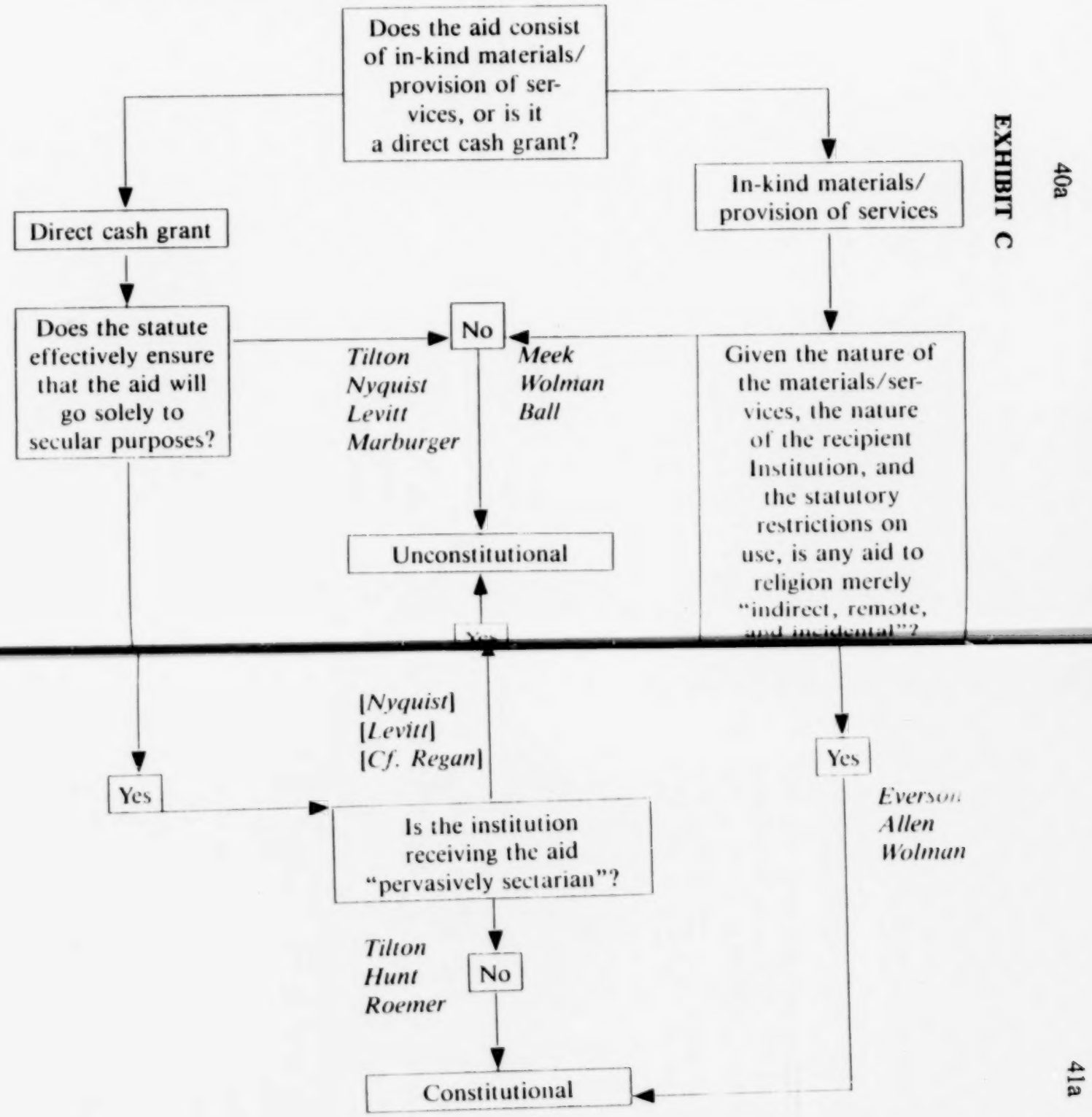
FUND RESTRICTION

SEC. 608. No funds for grants made under the provisions of this Act may be used for payment for the performance of an abortion.

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EXHIBIT C

FRAMEWORK FOR THIS COURT FOR CASES INVOLVING AID TO RELIGIOUS INSTITUTIONS DECIDED UNDER THE *LEMON* "EFFECTS" TEST*



* This chart does not include cases involving state subsidization of what are essentially private choices by *individuals*, such as was the case in *Mueller v. Allen*, 463 U.S. 388 (1983), and *Witters v. Washington Dept. of Servs. for the Blind*, 106 S.Ct. 748 (1986).

EXHIBIT D

PROPOSED ORDER OF THE ADOLESCENT PREGNANCY PREVENTION AND PREGNANCY SERVICES BOARD ADOPTING RULES*

To adopt APP 1, relating to grants for prevention of adolescent pregnancy.

Analysis Prepared by the Adolescent Pregnancy Prevention and Pregnancy Services Board

These are rules for the grant program administered by the Adolescent Pregnancy Prevention and Pregnancy Services Board under s. 46.93, Stats. Grants are awarded by the Board to stimulate development of and to support programs and services aimed at reducing the incidence of adolescent pregnancy and the adverse consequences of adolescent pregnancy. The grants are announced through a Request for Proposal (RFP) process and are awarded by means of a contract between the Board and each successful applicant following preliminary review of applications to identify those that are eligible for evaluation and final review to first identify applications that are eligible for funding and then to distinguish relatively more promising from relatively less promising applications. The Board's rules cover policies and procedures related to applying for a grant, the selection process, appeal of an adverse decision and restrictions on use of grant monies.

The Adolescent Pregnancy Prevention and Pregnancy Services Board approved these proposed rules on November 3, 1987.

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* The rules contained in this order took effect on the first day of the month following their publication in the Wisconsin Administrative Register, as provided in s. 227.11(2), Stats. Wis. Stat. Ann. § 46.93 (West 1987), as amended by 1987 Wis. Act 27, § 863br, reprinted in Wis. Legis. Serv. No. 2, at 207 (West 1987).

The Board's authority to adopt these rules is found in ss. 46.93(2) and 227.11(2)(a), Stats. The rules interpret s. 46.93, Stats.

SECTION 1. APP 1 is created to read:

CHAPTER APP 1
ADOLESCENT PREGNANCY PREVENTION PROJECTS

APP 1.01 Authority and purpose
APP 1.02 Applicability
APP 1.03 Definitions
APP 1.04 Project eligibility
APP 1.05 Application
APP 1.06 Restrictions
APP 1.07 Selection

APP 1.01 AUTHORITY AND PURPOSE. This chapter is promulgated under the authority of ss. 46.93 and 227.11(2)(a), Stats., for the purpose of establishing criteria, procedures, requirements and conditions for the award of project grants from the appropriation under s. 20.434(1)(b), Stats., to organizations that operate or propose to operate programs aimed at reducing the incidence or adverse consequences of adolescent pregnancy.

APP 1.02 APPLICABILITY. This chapter applies to the adolescent pregnancy prevention and services board, to applicants for grants awarded by the board, and to organizations that have been awarded grants by the board.

APP 1.03 DEFINITIONS. In this chapter:

(1) "Adolescent" means a young person between the ages of 10 and 18 years old.

(2) "Adolescent pregnancy prevention and services board" means the 13-member adolescent pregnancy prevention and pregnancy services board established under s. 15.195(5), Stats., to carry out the responsibility set out in s. 46.93(2), Stats., namely, to award grants to applicant organizations for adolescent pregnancy prevention programs and pregnancy-related supportive services.

(3) "Applicant" means an organization that applies for a grant from the adolescent pregnancy prevention and services board to operate a program aimed at reducing the incidence or adverse consequences of adolescent pregnancy.

(4) "Board" means the adolescent pregnancy prevention and services board.

(5) "Continuation grant" means a grant awarded by the board to an applicant who received an initial grant for the current funding year and who proposes to continue to operate the same program or that program as modified in consultation with the board in the new funding year.

(6) "Evaluation committee" means a committee of board members and other persons invited by board members which reviews, evaluates, and scores applications.

(7) "Funding year" means the 12-month period beginning July 1.

(8) "Grant" means a monetary award made by the board from the appropriation under s. 20.434(1)(b), Stats., to an applicant to help establish or support a program aimed at reducing the incidence or adverse consequences of adolescent pregnancy.

(9) "Initial grant" means a grant awarded for the first time to an applicant.

(10) "Nonprofit corporation" has the meaning prescribed in s. 46.93(1m)(c), Stats., namely, a nonstock, nonprofit corporation organized under ch. 181, Stats.

(11) "Public agency" has the meaning prescribed in s. 46.93(1m)(e), Stats., namely, a county, city, village, town or school district, an agency of Wisconsin state government or an agency of a county, city, village, town or school district.

(12) "Religiously affiliated organization" means an organization that is affiliated with a religious order or doctrine.

(13) "Pervasively sectarian organization" means a religiously affiliated organization in which a substantial portion of its functions are subsumed in a religious mission. This would include parochial schools, churches, and synagogues.

An applicant shall be determined to be a pervasively sectarian organization if it meets any of the following criteria, unless the applicant's mission statement, bylaws or charter state that the applicant's purpose is secular in nature and free of religious doctrine or control:

1. The governing board or staff of the applicant are answerable to a religious authority;
2. The stated purpose of the applicant has a religious mission;
3. The applicant requires that the majority of its governing board be of a specific religious orientation;
4. A ruling percentage of an applicant is owned and operated by a religious organization;
5. The referral, counseling and/or teaching activities of the applicant are restricted to the religious doctrine of that organization;
6. The applicant has a statement prohibiting certain activities due to religious doctrine;
7. The applicant has a requirement that employees must have a particular religious orientation or preference is given to hiring persons with a particular religious orientation.

(14) Request for proposals (RFPs) means a document that describes a grant program, invites applications and specifies who may apply, application procedures, criteria for awarding grants and conditions and restrictions that accompany grant awards.

APP 1.04 PROJECT ELIGIBILITY. (1) The board shall fund projects that have prevention of adolescent pregnancies as their major goal. The board may also fund projects that provide health care, education, counseling, vocational training and other supportive services to adolescents who are pregnant.

(2) The board may limit funding to projects which provide services in counties which the board has targeted based on the counties' adolescent fertility rates or the number of births to adolescents in the counties.

(3) No organization that will have a continuation grant may receive funds under an RFP to provide services in that funding year in the county or counties in which the continuation grant project is located; and

(4) No organization may have more than two grants from the board at one time.

APP 1.05 APPLICATION. (1) WHO MAY APPLY. (a) An applicant shall be:

1. A public agency;

2. A nonprofit corporation;

3. A coalition of organizations under the auspices of a public agency or nonprofit corporation; or

4. The tribal governing body of a federally recognized Wisconsin tribe or band of Indians, or an American Indian organization appointed by the tribal governing body.

(b) A religiously affiliated organization may apply for funds. However, the APPS Board will make a factual determination as to whether the applying organization is determined to be pervasively sectarian and if the organization is determined to be pervasively sectarian it will not be eligible for funding.

(2) SOLICITATION. (a) The board shall solicit applications for grants, except continuation grants, by preparing one or more RFPs, publishing a legal notice regarding the availability of an RFP at least twice in the official state newspaper no later

than six weeks before the application deadline, and distributing copies of the RFP on request.

(b) The board shall solicit applications for continuation grants from currently funded organizations.

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Appellant,
v.
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On Appeal from the United States District Court for the District of Columbia

REPLY BRIEF OF UNITED FAMILIES OF AMERICA

MICHAEL W. MCCONNELL
1111 E. 60th Street
Chicago, IL 60637
(312) 702-3306
Counsel of Record

EDWARD R. GRANT
JAMES MICHAEL THUNDER
CLARKE D. FORSYTHE
AMERICANS UNITED FOR LIFE
LEGAL DEFENSE FUND
343 S. Dearborn Street Rm. 1804
Chicago, IL 60604
(312) 786-9494

PAUL ARNESON
1701 Pennsylvania Ave., Suite 940
Washington, D.C. 20006
(202) 785-0530

MICHAEL J. WOODRUFF
MICHAEL STOKES PAULSEN
c/o CENTER FOR LAW &
RELIGIOUS FREEDOM
P.O. Box 1492
Merrifield, VA 22116
(703) 560-7311

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REPLY BRIEF OF UNITED FAMILIES OF AMERICA

I. The District Court Erred In Holding That Religiously Affiliated Organizations Must Be Excluded From Involvement In The AFLA

The question in this case is whether, as the district court held, qualified private organizations must be excluded from participation in an otherwise neutral grant program solely on the basis of religious belief or affiliation. It thus poses a straightforward question of law: does the Establishment Clause require government-funded, privately-administered programs to be *secular*, or does it require the government to be *neutral* between religion and nonreligion? In our opening brief, United Families of America contended that when the government enters a field of social endeavor previously occupied by private (including religious) voluntary associations and provides resources to support and expand those private activities, it must employ neutral, objective, secular criteria for the selection of grantees and distribution of funds. Religious organizations must be neither favored nor disfavored.

By "neutral," we mean, of course, that the program must be neutral with regard to religion. The AFLA is not neutral, nor need it be neutral, with regard to such issues as adolescent sexuality, adoption, or abortion. This Court has confirmed that government is permitted to "make a value judgment favoring childbirth over abortion, and to implement that judgment by the allocation of public funds." *Maher* v. *Rae*, 432 U.S. 464, 474 (1977). Government promotion of this "value judgment" through the allocation of public funds cannot be challenged under the Establishment Clause on the ground that it "'happens to coincide or harmonize with the tenets of some or all religions.'" *Harris* v. *McRae*, 448 U.S. 297, 319 (1980), quoting *McGowan* v. *Maryland*, 366 U.S. 420, 442 (1961). The government is not required to be neutral with regard to issues of "traditionalist" morality (448 U.S. at 319)—especially since those issues have significant relation to public health. It is, however, required to be neutral with regard to religion. The government is entitled to promote adolescent sexual self-discipline and adoption as alternatives to "safe sex" and abortion, but it must do so without showing a preference for religious institutions over secular, or secular over religious.

As participants in government-funded programs, religious organizations, like any others, must comply with all lawful statutory and administrative terms of the grant program. In this case, those terms include the requirement that grantees not use AFLA funds to "teach or promote religion." J.A. 757, 759, 761. It is common ground that a few AFLA grantees have violated this restriction, indeed, that some AFLA grantees have been reprimanded and even barred from the program for violations of grant restrictions. It is possible that there have been additional violations, in which case there may need to be additional sanctions against violators. This, we emphasize, is common ground. Where we differ from appellees and the court below, however, is that we believe the First Amendment does not require, but affirmatively pro-

hibits, the government from treating all religiously-affiliated organizations as violators, simply on the basis of their beliefs and affiliations. "The Establishment Clause does not license government to treat religion and those who teach or practice it, *simply by virtue of their status as such*, as subversive of American ideals and therefore subject to unique disabilities." *McDaniel* v. *Paty*, 435 U.S. 618, 641 (1978) (Brennan, J., concurring) (emphasis added).

Religious organizations are not pariahs, any more than they are paragons. Most of the religiously-affiliated organizations involved in the AFLA have complied with the grant terms and performed valuable public services.[1] There is no basis for excluding them from the program in the absence of appropriate determinations that they have violated the terms of the grant. The issue before this Court is not whether there have been violations, but whether, in the absence of proof, the government must rely on a conclusive presumption that religious organizations are unfit for participation in the AFLA.

a. Appellees' brief attempts to distract from the legal issue in this case by a lengthy and one-sided recital of factaul assertions that were not among the district court's findings of fact. The district court's factual findings were few, largely because the legal theory on which its summary judgment rested—that no religiously-affiliated organizations may participate in government-funded programs related to their religious mission—does not hinge upon particularized findings. On appellate review of a grant of summary judgment, the party opposing summary judgment is entitled to a construction of the facts in the light most favorable to its position, and to resolu-

[1] We especially commend to this Court's attention the *amicus curiae* briefs filed by Catholic Charities, U.S.A., and by the Institute for Youth Advocacy, Covenant House, describing the operation of some of the AFLA grantees that will be defunded if the order below is not reversed.

tion of all disputed issues in its favor. *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 158-59 (1970); *United States* v. *Diebold, Inc.*, 369 U.S. 654, 655 (1962). Under this standard, it must be assumed that most religiously-affiliated AFLA grantees have provided the secular services the government wishes to promote, without engaging in any diversion of grant funds to proscribed religious uses and without violating any grant conditions. They have done nothing wrong," other than to exercise their constitutionally protected right to believe as their conscience dictates.

Appellees' felt need to supplement the decision below with "facts" not found by the district court powerfully demonstrates the deficiencies in the district court's judgment. If acceptance of appellees' position requires relying on facts not thought material by the district court, then the obvious conclusion, even under their theory of the case, is to remand for further proceedings.

b. More important than these factual deficiencies, however, is the district court's erroneous interpretation of the Establishment Clause. This Court cannot be expected to comb the record in this case to determine, as a factual matter, whether or how many AFLA grantees have violated the grant terms. This Court must, however, determine whether the district court correctly construed the Establishment Clause.

Appellees concede that the district court's decision is not neutral toward religion. Neutrality, appellees assert, is "alluring in the abstract," but is not the goal of the Establishment Clause. App. Br. 56. Instead of neutrality, appellees advocate the following standard: "Governments may not exercise their broad spending power to make outright grants to religious institutions that so much as risk supporting the sectarian mission of those institutions." *Ibid.* This is simply a restatement of the strict "no-aid" theory long disavowed by this Court. See *Hunt* v. *McNair*, 413 U.S. 734, 743 (1973); *Mueller* v.

Allen, 463 U.S. 388, 393 (1983); *McDaniel* v. *Paty*, 435 U.S. 618, 638 (1978) (Brennan, J., concurring). The correct proposition is that "the benefit of government programs and policies [must be] generally available, on the basis of some secular criterion, to a wide class of similarly situated nonreligious beneficiaries." *Marsh* v. *Chambers*, 463 U.S. 783, 809 (1983) (Brennan, J., dissenting). See *Witters* v. *Department of Services*, 106 S. Ct. 748 (1986); *Mueller* v. *Allen*, 463 U.S. 388 (1983); *Widmar* v. *Vincent*, 454 U.S. 263 (1981); *Walz* v. *Tax Commission*, 397 U.S. 664 (1970); *Bradfield* v. *Roberts*, 175 U.S. 291 (1899). To insist that government spending programs never "so much as risk supporting the sectarian mission of those institutions" (App. Br. 56) would require a systematic hostility toward religion. *Roemer* v. *Board of Public Works*, 426 U.S. 736, 746-47 (1976) (plurality opinion per Blackmun, J.); *Widmar* v. *Vincent*, 454 U.S. at 274-75.

An organization's "sectarian mission" is inevitably advanced by participation in government benefits, whether they are support for the organization's social welfare activities, tax exemptions for its place of worship, tax deductions or tuition subsidies for its schools, or even police protection for its property. This cannot be decisive. The issue in each case must be whether the government's action is based on truly neutral, objective criteria, not on whether one effect is to benefit religion. If the benefit is extended to an organization without regard to its religious character or affiliation, the benefit does not offend the Establishment Clause, even though it obviously will have the effect of "supporting" the organization's "sectarian mission" of feeding the poor, healing the sick, worship, education, or fellowship.[2]

[2] This is why the parochial school cases have proven so difficult: while the criteria for aid are ostensibly (and perhaps geuinely) secular and neutral, the vast preponderance of recipient institutions are, and are known in advance to be, sectarian. This case is easier to resolve, because the criteria are neutral *and* the recipient institutions are predominantly secular.

In our opening brief (at 27-30), we demonstrated that AFLA funds are distributed on the basis of neutral criteria, without regard to religion, as Congress intended. Indeed, more than 75 per cent of the grantees have no religious affiliation. *Compare* J.A. 748-54 *with* 755-56 (at most 25 of the 100 grantees have religious affiliation). For purposes of appellate review, moreover, the decisive point is that the district court made no finding that the AFLA grants have in any way been "skewed toward religion." *Witters* 106 S. Ct. at 752.[3] On the contrary, the district court concluded, as a matter of law, that the Constitution requires the program to be skewed *against* religion. While it is open to appellees on remand to demonstrate that the Act has not in fact been neutrally administered, the district court's holding that religiously-affiliated organizations must be categorically excluded is wrong in principle.

Perhaps recognizing that neutrality toward religion is not irrelevant, appellees assert four reasons why they believe the AFLA is not neutral. First, they claim that "by requiring religious involvement, the AFLA actually gives a non-neutral preference to religious organizations." App. Br. 57. However, the AFLA does *not* require religious involvement any more than it does the involvement of other community groups. At every point in the statute where "religious organizations" are mentioned, they are included as part of a broad class of community organizations: "religious and charitable organizations, voluntary associations, and other groups in

[3] Evidently aware of the lack of a factual finding on this key point, appellees offer their own assessment of the record. They contend that the record shows that AFLA administrators were biased toward religious organizations in their selection of grantees. See App. Br. 7-10. The district court made no such factual finding, and evidence in the record contradicts it (*see, e.g.*, J.A. 781-83). In any event, resolution of disputed issues of material fact is appropriate for remand and not for this Court on appeal from a grant of summary judgment.

the private sector as well as services sponsored by publicly sponsored initiatives." 42 U.S.C. §§ 300z(a)(8)(B), (10)(C), 300z-5(a)(21). All community organizations —public and private, religious and secular—are to be involved "as appropriate." As the Senate Report states: "Religious affiliation is not a criterion for selection as a grantee under the adolescent family life program, but any such grants by the Secretary would be a simple recognition that nonprofit religious organizations have a role to play in the provision of services to adolescents." S. Rep. 97-161, 97th Cong., 1st Sess. 15-16 (1981).[4]

Second, appellees observe that "the AFLA is a competitive grant program," but they do not explain why this makes it "decidedly *non*-neutral." App. Br. 57. The question is whether the competition is based on objective, secular criteria. Since more than three quarters of the "winners" of the "competition" are nonreligious, this suggests that the program is in fact neutral.

Third, appellees assert that "only religious organizations that adhere to certain beliefs regarding reproduction, abortion, and chastity are eligible for AFLA funding." App. Br. 57. This assertion is both untrue and logically misleading. It is untrue because AFLA restric-

[4] Appellees' repeated assertion that the AFLA requires the involvement of religious organizations (*e.g.*, App. Br. 1, 2, 3) contradicts the district court's interpretation of the statute (U.S. J.S. App. 21a) (emphasis added):

> Title VI was amended not only to add religious organizations to the list of entities that *may* participate in AFLA programs, but also to add families, charitable organizations, voluntary associations, and other groups. *See* 42 U.S.C. § 300z-5(a)(21)(B). Religious organizations are only one of five types of entities that *may be* involved in an AFLA program.

Of course, Congress intended religious groups—along with others—to be involved as appropriate, but that is a far cry from appellees' statement that the "AFLA's mandates on religious involvement give religion a preference over nonreligion." App. Br. 31.

tions are not based on a grantee's "beliefs," but only on its willingness to abide by law in its administration of AFLA projects. As the district court stated, "[b]y prohibiting a grant recipient from advocating abortion in an AFLA program or project, the AFLA did not condition a 'benefit' on a particular religious belief but merely restricts a *program or project* from using federal tax dollars to advocate a particular course of action." U.S. J.S. App. 14a-15a (emphasis in original). A grantee can believe whatever it wishes, and can conduct its affairs—other than the AFLA project—however it wishes. Appellees' assertion is logically misleading because it implies that to be "neutral" the government must engage in programs that are equally desirable to every religious sect. This is not the meaning of neutrality. That some religions advocate feeding the poor while others believe in the sanctity of work and self-reliance for the able-bodied, for example, does not make grants for feeding programs "non-neutral" in a constitutional sense. Government is neutral, in this context, if its program requirements are set on a neutral, secular basis and all organizations are eligible for participation without discrimination on the basis of religion. *Gillette* v. *United States*, 401 U.S. at 437 (1971).

Ironically, the program appellees support, which would require grantees to provide the full range of pregnancy-related services (see App. Br. 21-22), would be unconstitutional under the standard they espouse in this case. Participation in such programs would be open only to religious organizations that are willing to provide abortion and artificial contraception, just as the AFLA is open only to those willing to foster sexual self-discipline and adoption. Under appellees' theory of the case, Title X of the Public Health Services Act, 42 U.S.C. § 300a (1982), the nation's largest family planning program, is constitutionally indistinguishable from the AFLA and must be struck down if the decision below is affirmed. Title X makes grants to private organizations, including

churches,[5] for provision of services, notably contraceptive services and counselling, that accord with some (but not all) religious doctrines.

The fourth, and "perhaps most important[],"[] reason appellees claim the AFLA is "*non*-neutral" is that "the ultimate beneficiaries, the targeted adolescents, are presented with government sponsored, religiously dictated medical services and education, regardless of the personal religious beliefs of the adolescent." App. Br. 57. This is a strange contention indeed. In a world of differing views, the only way that "targeted adolescents" can exercise a choice in the philosophy of the service provider is if the widest possible array of grantees is permitted, consistent with the purposes of the statute.

This point merits elaboration, for its identifies a principal philosophical difference between appellees and ourselves. We believe that in an area of great sensitivity, upon which there are many differing moral, political, religious, medical, and practical points of view, the public policy most consistent with the pluralistic vision of the First Amendment is for the government to extend funding to as broad and diverse a range of private and community associations as may contribute to the statute's secular objective. It is better—fairer, more neutral, more effective—for the government to facilitate a wide variety of private and community organizations, each of them free to approach the statutory objective in its own way, rather than to attempt to impose a secular perspective on a diverse society.

Religious pluralism has advantages for practical as well as theoretical legal reasons. A significant subsection within our society is unreceptive to forms of "sex education" they believe to be inimical to their religious beliefs. Unless a program such as the AFLA can work within a

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[5] See HHS, *Family Planning Grantees, Delegates, and Clinics* (1987/1988 Directory) (listing religious organizations as among the Title X grantees).

context that they can trust, the children within these groups will not be permitted to participate, with potentially grave consequences to their own well-being and the goals of the program. Only a program that works with the cooperation of trusted intermediary institutions, such as churches and community groups, will be effective in reaching out to the many diverse elements of the United States population in ways they can understand and appreciate.

Appellees, in contrast, contend that the government has no option other than to insist on a homogeneous secular approach to these moral questions, an approach that does not reflect the religious and philosophical variety of our people. Appellees complain, for example, that federal funds were used "to structure and then teach from curriculums that were designed to be compatible with particular religious beliefs" (App. Br. 34), and that one secular grantee stated that it would not "contradict [that] which is taught at home or in church" (*id.* at 11) —as if the Constitution required a studied insensitivity and intolerance toward religion. Appellees castigate two secular grantees, the Southeast Missouri Association of Public Health Administrators (SeMo) and Memorial General Hospital of West Virginia, for helping teenagers and their families to learn to discuss pregnancy-related issues in terms of "their own values." *Id.* at 10, 11. The predictable result of appellees' approach would be a program less respectful toward individual religious beliefs, with less freedom of choice for adolescent beneficiaries, less diversity, and less effective communication with those portions of the population who do not speak the language of secularized morality.

We can think of no less intrusive way for the federal government to promote sexual self-discipline and related statutory purposes than to encourage individuals, families, and private associations, including churches, to deal with these issues in terms of *their own* values. Certainly, this is far superior to imposing secular values

upon all participants in the program. There is a difference between promoting religion and being sensitive to the religious background many families bring to these issues. Nothing in the Constitution requires government-funded grantees to be indifferent or hostile to the religious values of the people they are asked to help. *Zorach* v. *Clauson*, 343 U.S. 306, 313-14 (1952).

c. Appellees concede that religious organizations are not, and should not be, categorically excluded from participating in government-funded social welfare programs, such as those to feed the hungry or house the poor. App. Br. 1-2, 53.[6] They attempt to distinguish the AFLA, however, apparently on the ground that the AFLA constitutes a form of education—more specifically "sex education"—and is therefore closer to parochial school aid than to social welfare programs. App. Br. 48-49, 53. Putting aside for the moment the fact that many AFLA services have nothing to do with sex or any other education,[7] appellees fail to respond to any of the reasons set forth at length in our opening brief (at 45-47) for why parochial school aid has been consistently treated by this Court under an especially stringent standard. To review those reasons: (1) parochial school aid is directed to a class of institutions that are overwhelmingly religious in nature, rather than to a genuinely neutral class of recipient institutions; (2) parochial school aid decisions have, without exception, been predicated on a factual finding that the recipient institutions were "pervasively sectarian"; and (3) parochial schools are designed to create a total environment in which religious teaching is incorporated into a sustained, comprehensive education covering virtually all aspects of life. These are the reasons why the *Lemon* test invalidates most forms of aid to

[6] Appellees' position on this is not consistent through the brief. With the statements cited in text, compare, *e.g.*, App. Br. 54 (the "constitutional dividing line between [parochial] schools and institutions providing 'social welfare services' . . . does not exist").

[7] See our opening brief, at 47-49.

parochial schools while upholding neutral aid to discrete religious social welfare functions. None of these reasons apply to the AFLA, in which most grantees are secular, many of the religiously-affiliated grantees are far from being "pervasively sectarian," and the services are discrete and unconnected to any larger program of religious education.

Appellees' distinction between the AFLA and other social welfare activities is rooted in their conviction that "these issues are of fundamental religious importance." App. Br. 36. Indeed, appellees understand the AFLA as constituting "government fund[ing] [of] both religious institutions and secular institutions to promote religious beliefs." App. Br. 30. *See also* App. Br. 4 (the AFLA makes "instructions and indoctrination of certain values concerning sexuality a major component of the Act"). It is not so much the affiliations of the grantees as the nature of the statutory objective to which appellees object. Appellees' distinction between the AFLA and other social welfare programs is rooted in their fundamental disagreement with *Maher* v. *Roe* and *Harris* v. *McRae*. They cannot accept that, from an Establishment Clause perspective, the encouragement of adolescent sexual self-discipline and adoption is a secular purpose. But if they were right—if sex education were intrinsically a religious matter—the proper result would be to forbid the government from entering the field at all.[8]

It is only on the premise that teaching adolescents about sexuality is a legitimate secular enterprise that sex education is constitutionally permissible at all. And if it is a legitimate secular enterprise, there is no reason why nonreligious organizations should be favored over religious. Indeed, the more sensitive the subject matter,

[8] And it is important for these purposes to recall, as appellees point out (App. Br. 24 & n.54), that sex education encouraging contraception and abortion is no less "religious" than the opposite. Some religions take one view, some religions take the other.

the more important it is to treat it without bias for or against religion.

d. Appellees are rightly concerned about the appearance of endorsement of religion. App. Br. 1, 22-24. They completely disregard, however, the equal and opposite danger of an appearance of disapproval of religion. See *Lynch* v. *Donnelly*, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring). The ideal statute is one that *includes* religious organizations, but without special place or recognition. The AFLA, we submit, is such a statute. Congress took great care to refer to religious organizations *only* as among a broad array of charitable and voluntary associations, public and private. As this Court has observed, "Focus exclusively on the religious component of any activity would inevitably lead to its invalidation under the Establishment Clause." *Lynch* v. *Donnelly*, 465 U.S. 668, 680 (1984). Viewed in the larger context of predominantly secular grantees under the AFLA—and especially in the context of the panoply of federal family planning programs that take a different approach from the AFLA—no reasonable observer would conclude that the inclusion of some religiously-affiliated grantees under this statute sends a message of endorsement of religion over nonreligion.

e. In our opening brief, we showed that, even under the more restrictive criteria applicable to programs that are not genuinely and reliably neutral in their distribution of funds, the district court's order was overbroad in three respects. First, it excluded potential participants on the basis of mere religious affiliation—sometimes quite nominal—rather than confining its proscription to organizations so "pervasively sectarian" that they could not separate religious from nonreligious activities (pages 37-40). Second, it excluded organizations without any finding that they had used AFLA funds for "specifically religious" purposes (pages 40-43). Third, it prohibited religious organizations from providing even those non-

educational care services that are inherently nonsectarian and nonideological, such as pregnancy testing, housing, health and nutrition, and adoption services (pages 47-49).

Nothing in appellees' brief contradicts our contention that the district court's judgment is at best overbroad. To be sure, appellees attempt in their brief to supply the factual findings so lacking in the district court's opinion. The district court expressly declined to rule on whether any individual grantee was "pervasively sectarian" (U.S. J.S. App. 23a-25a). Appellees compensate by offering their opinion (dressed up as fact) that three of the grantees, St. Margaret's, St. John's, and Brigham Young University, are "pervasively sectarian." App. Br. 42.[9] Similarly, appellees assert that AFLA funds were used for "specifically religious activit[ies]" (App. Br. 33-34, quoting *Hunt* v. *McNair*, 413 U.S. 734, 743 (1973)), referring to several alleged incidents that the district court did not mention and about which the district court made no findings of fact. (Like the district court, appellees simply ignore the existence of inherently nonsectarian services funded under the Act.) It is possible that appellees may be correct about these and other factual assertions, but the assertions of a party to the litigation are no substitute for judicial fact-finding.

In any event, most of the charges appellees have culled from the record are wholly immaterial to the issue whether grantees have used AFLA grant funds to promote religion. Appellees' characterization of the facts must be read with a skeptical eye. While there is neither need nor space for a point-by-point analysis, we would observe that most of appellees' alleged abuses consist of one of the following: (1) the content of grant *applications*, with no showing that the specifically religious aspects were approved or carried out;[10] (2) religious activities by *paricipants* in the programs, as opposed to *grantees*;[11] (3) religious activities by grantees *outside* the AFLA program, at their own expense;[12] (4) presentations by grantees to religious audiences, whatever their content;[13] (5) religious motivations of AFLA grantees, with no showing of the teaching or promotion

[9] Appellees do not attempt to defend the district court's unprecedented theory, discussed in our opening brief (at 37 n.22), that it had no need to determine whether AFLA grantees were "pervasively sectarian."

[10] *E.g.*, App. Br. 15 n.34 (application of Catholic Social Services of Wayne County); *id.* at 15 (application of Families of the Americas Foundation). In one instance involving Catholic Charities of the Diocese of Arlington (App. Br. 18), appellees recount at length problems with *proposed* curriculum, even though the record shows (J.A. 112-13), and appellees admit that prior to final approval HHS officials contacted the applicant and "obtained assurances" that AFLA funds would not be used to teach the problematic curriculum. App. Br. 19.

[11] For example, appellees state that "[t]he government has funded grantees . . . to provide programs that included the 'Biblical and theological views regarding sex,'" (App. Br. 29-30), when in fact the reference in the record is to a Presbyterian church group that requested a presentation from a secular grantee (the Northwest Regional Health Center of Shreveport, Louisiana), which the youth group leader said he would follow "by a brief presentation *by myself* on Biblical and theological views regarding sex." J.A. 568 (emphasis added). Surely it is not a violation of the Establishment Clause for religious groups to educate their own members about the religious dimensions of sexuality.

[12] See, *e.g.*, App. Br. 14 & n.30 (discussing Providence Hospital's "Rainbow" program, although only its secular counterpart, the "Pathways" program, was funded under the AFLA).

[13] See, *e.g.*, App. Br. 12 n.24 (Maternal and Child Health Program of the State of Hawaii provided "church and counseling based efforts at reaching families"); *id.* at 15 n.34 (Catholic Social Services of Wayne County intended to make presentations to religious groups); *id.* at 11 n.23 (Memorial General Hospital of West Virginia conducted workshops in church facilities for children and their Sunday School teachers).

of religion in the programs;[14] or (6) opposition to abortion or artificial contraception.[15] Very few of appellees' factual assertions point directly to AFLA-funded, "specifically religious" activities designed to "teach or promote religion."

II. The District Court's Severability Ruling Is Correct On Severability Principles But Should Be Reversed On Constitutional Grounds

In its order of August 13, 1987, the district court held that "the AFLA's references to 'religious organizations' are severable from the statute and that the remainder of the AFLA is fully operable as law in a manner consistent with the intent of Congress." U.S. J.S. App. 53a. Appellees took a cross-appeal from this aspect of the judgment. While their argument on severability principles is wholly without merit, we agree on constitutional grounds that the AFLA cannot be enforced in the form it was rewritten by the district court.

If Congress were to pass a statute authorizing grants to private organizations "except those affiliated with religion," the statute would be plainly unconstitutional under the Free Exercise Clause and the equal protection component of the Due Process Clause. While the *conduct* of individuals or organizations is subject to state regulation, the freedom to *believe* is absolute. *Cantwell* v. *Connecticut*, 310 U.S. 296, 303-304 (1940). Long before this Court first recognized the right of believers to certain exceptions from government practices that burden the free exercise of religion, see *Sherbert* v. *Verner*, 374 U.S. 398 (1963), the Free Exercise Clause protected individuals and groups from being penalized by the government on account of their religious belief, character, or affiliation. *Davis* v. *Beason*, 133 U.S. 333, 342-43 (1890); *Reynolds* v. *United States*, 98 U.S. 145, 166-67

[14] See, *e.g.*, App. Br. 15 & n.32 (Family of the Americas Foundation was "inspired by the Encyclical *Humane Vitae*"); *id.* at 14 n.31 (grantee's description of its "philosophical orientation").

[15] See App. Br. 19-22.

(1879); see *McDaniel* v. *Paty*, 435 U.S. 618, 626 (1978); *id.* at 635 n.8 (Brennan, J., concurring).[16] Organizations may be barred from government programs because they do not comply with the statutory or administrative requirements, but they cannot be barred because they are religious. As rewritten by the district court, the AFLA imposes a stiff financial penalty on organizations for religious affiliation, in plain violation of the Free Exercise Clause.[17]

It is far preferable from the point of view of the First Amendment for the federal government to leave the field of sexuality instruction to the private institutions of choice than it is to skew the discussion in favor of nonreligious over religious perspectives. If the issues at hand are "inseparable from religious dogma," as the district court concluded (U.S. J.S. App. 36a), it is no solution to say that the government will subsidize only the secular perspective. This is not a subject for which a secular treatment can be said, realistically, to be neutral. A secular orthodoxy about issues of moral and religious import is no less offensive under the First Amendment than a religious orthodoxy.

The district court erred in rewriting the statute to exclude otherwise qualified organizations on the basis of religious affiliation. Unlike Congress's AFLA, which strove to involve the full range of "religious and charitable organizations, voluntary associations, and other groups in the private sector as well as services provided by publicly sponsored initiatives" (42 U.S.C. § 300z-5(a)(21)), the district court's rewritten statute explicitly

[16] Indeed, the roots of this principle are older even than the First Amendment. The Constitution's Article VI states that "no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States." It cannot be that the same Constitution imposes a religious test (in this case, a *non*religious test) in order to be an AFLA grantee.

[17] Alternatively, the violation may be conceptualized as one of the equal protection component of the Due Process Clause. See *McDaniel* v. *Paty*, 435 U.S. at 643-46 (White, J., concurring).

discriminates on the basis of religious belief and brands some citizens as "outsiders, not full members of the political community." *Lynch* v. *Donnelly*, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring).

CONCLUSION

The district court's summary judgment invalidating the AFLA insofar as it involves religious organizations should be reversed. If that judgment is affirmed, then the court's ruling that AFLA funding of only nonreligious organizations may continue should be reversed under the Free Exercise Clause.

Respectfully submitted.

MICHAEL W. MCCONNELL
1111 E. 60th Street
Chicago, IL 60637
(312) 702-3306
Counsel of Record

EDWARD R. GRANT
JAMES MICHAEL THUNDER
CLARKE D. FORSYTHE
AMERICANS UNITED FOR LIFE
LEGAL DEFENSE FUND
343 S. Dearborn Street Rm. 1804
Chicago, IL 60604
(312) 786-9494

PAUL ARNESON
1701 Pennsylvania Ave., Suite 940
Washington, D.C. 20006
(202) 785-0530

MICHAEL J. WOODRUFF
MICHAEL STOKES PAULSEN
c/o CENTER FOR LAW &
RELIGIOUS FREEDOM
P.O. Box 1492
Merrifield, VA 22116
(703) 560-7314

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In the Supreme Court of the United States

OCTOBER TERM, 1987

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, APPELLANT

v.

CHAN KENDRICK, ET AL.

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

REPLY BRIEF FOR THE FEDERAL APPELLANT AND BRIEF FOR THE FEDERAL CROSS-APPELLEE

CHARLES FRIED
Solicitor General

JAMES M. SPEARS
Acting Assistant Attorney General

DONALD B. AYER
Deputy Solicitor General

ROBERT J. CYNKAR
Deputy Assistant Attorney General

LAWRENCE S. ROBBINS
Assistant to the Solicitor General

MICHAEL JAY SINGER
THEODORE C. HIRT
JAY S. BYBEE
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

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In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-253

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v.

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No. 87-431

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, APPELLANT

v.

CHAN KENDRICK, ET AL.

No. 87-462

CHAN KENDRICK, ET AL., CROSS-APPELLANTS

v.

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL.

No. 87-775

UNITED FAMILIES OF AMERICA, APPELLANT

v.

CHAN KENDRICK, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

REPLY BRIEF FOR THE FEDERAL APPELLANT AND BRIEF FOR THE FEDERAL CROSS-APPELLEE

Introduction

Appellees' responsive brief distinguishes itself among briefs filed with this Court, in two respects.[1] First, although defending the judgment of the district court, the brief is careful to avoid endorsing the legal rationale upon which that court relied. Second, fully half of the brief is devoted to a selective discussion of factual matters – not the facts as found by the court below, but rather selected facts revealed during discovery along with an enormous volume of other, inconsistent material that appellees never mention. These two features of appellees' brief confirm, first, that the reasoning of the district court is indefensible, and, second, that the proper resolution of this case awaits evaluation of a complex factual record, applying the principles enunciated in this Court's Establishment Clause cases.[2]

A. The District Court Erred in Holding the AFLA Unconstitutional

1. Appellees' factual assertions offer no basis on which to uphold the decision of the district court

Appellees seek to put before this Court, de novo, a body of evidence relating to the operation of the AFLA and to the conduct of particular grantees. They ask the Court to consider this material and, having done so, to ratify the constitutional holding of the district court. There are two reasons why the Court should decline to follow such a course. First, the district court's reliance on an unprecedented "direct and immediate" standard for identifying establishments of religion led it to make virtually no factual findings on any of the specific factual

[1] In both respects, however, it has much in common with the amicus briefs filed in support of appellees. No brief in this case has undertaken to support the reasoning of the district court, and most place heavy emphasis on facts as to which there were no findings below.

[2] Appellees do not dispute our contention (Appellant's Br. 31 n.24) that the district court erred in concluding that appellees have standing as taxpayers to challenge the AFLA as applied. Their possible standing as members of religious ministries (Appellees' Br. 5 n.10) was not addressed by the district court.

matters asserted by appellees. Second, the factual assertions raised at length by appellees are sharply contested. *Both* sides have submitted proposed findings and have supported those findings with detailed citations to the underlying testimony, affidavits, and exhibits. The Court is in a position to rely on specific factual findings only if it is prepared to make those findings itself.[3]

For example, appellees quote the testimony of one witness who expressed "surprise[]" (Br. 7-8) at the allegedly "high proportion [of] religious affiliation (30 or 40 percent)" and the "lack of experience" of the grant readers; they do not cite the testimony of the AFLA Director, who explained that she had selected readers based upon their experience and other credentials, and that religious affiliation was not a criterion for selection (R. 111, 106, 110, 119, 141-143, 265). Appellees cite (Br. 8 & n.15 (emphasis in original)) several readers' comments as evidence that the AFLA "was intended to *require* religious indoctrination"; they do not point out that those comments were a tiny fraction of the more than 6000 reader statements (R. 110, 187), that the Director could not recall even having reviewed any particular reader comments in making the actual grant awards (R. 111, 147), or that the Director was not bound by reader comments but instead made the final decisions based upon independent criteria unrelated to religious affiliation (*id.* at 149, 225).

Appellees cite (Br. 10-12) SeMo, Charles Henderson Child Health Center (CHCHC), and Memorial General Hospital Association as examples of secular grantees that were funded to use religious means to achieve AFLA goals; they neglect to cite any of the abundant evidence showing that each of those grantees operated lawful, secular programs, and that they involved religious groups, not in a doctrinal capacity, but as part

[3] Although appellees and some of the amici go quite far in inviting this Court to resolve factual disputes present in the record, and as to which the district court has made no findings, amici NOW et al. propose to go a good bit farther. In their "lodging," they ask the Court to evaluate materials that are not even part of the record and that have been gathered and submitted by amici for the first time to this Court. We have referred this material to HHS for its review and for whatever action may be appropriate.

of a broad array of community institutions through which secular services could be transmitted to the public (see, *e.g.*, R. 181 (Campbell decl.) 8-9; *id.* (Little decl.) 7, 11).[4] While appellees cite certain grant applications as evidence that "secular grantees promoted religion" (Br. 12 & n.24), they do not mention the evidence showing that, in practice, the cited programs were devoid of religious content (see *e.g.*, R. 181, 507006, 507008 (Hawaii program); *id.* at 517041-517122 (Lyon County); *id.* at 511005 (Tucson Unified School District)).

Similarly, appellees' claim (Br. 12-13) that AFLA programs presented religious material in the public schools turns on snippets wrenched from their context (see R. 181 (Vincent decl.) 7, 11 (University of South Carolina)), and broad mischaracterizations of the record (see, *e.g.*, R. 181 (Forliti decl.) 5, 8-9, 10, 12-13, 17; R. 125, 54-55, 83-85, 118-119, 127-128, 161-162, 167, 174, 177; R. 181 (Olson decl.) 4-11). Appellees cite (Br. 16-17) Catholic Family Services of Amarillo as a grantee that built its AFLA program on a religious base, but they omit the evidence showing that CFS's policies prohibit the imposition of religious doctrine on clients, and that its AFLA program did not in fact provide religious instruction (R. 181 (Watson decl.) 10, 11, 15, 18, 23).[5]

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[4] Appellees' assertion (Br. 11) that CHCHC used AFLA funds to promote a "Family Week" and "Family Sunday," in which pastors were encouraged to inculcate Christian values, is baseless. CHCHC sponsored a "Day of the Family" program, which took place on a Sunday, and ministers were asked to mention the event. That, however, was the only involvement of the clergy in the program. The event was not used to promote Christian values, and no AFLA funds were used to pay for it. R. 181 (Little decl.) 13-15.

[5] Similar overstatements or misstatements of the record abound. Thus, while appellees assert (Br. 18) that HHS permitted a religious curriculum to be taught in the Boston public schools, a reading of that curriculum shows it to be indisputably secular (R. 181, 711009-711209). Although one of the appellees' witnesses did assert that the medical care at St. Margaret's was inappropriate (Br. 21), another witness disputed that claim (J.A. 678). Appellees' contention that AFLA programs conveyed a link between the government and religion turns on statements taken out of context (see, *e.g.*, R. 181 (Vincent decl.) 10), and incomplete accounts of the record (see, *e.g.*, R. 181, 304029-304051). Appellees' suggestion (Br. 26 n.57) that one grantee was rejected because of a Methodist affiliation is mistaken. Indeed, Emory University, which is Methodist affiliated, was one of the AFLA grantees (R. 181, 312004-312005). While one of appellees' witnesses opined that religious pressure persuaded HHS not to renew the AFLA grant for the University of Arkansas (Br. 31), the AFLA Director testified that the decision was based on other grounds (R. 111, 165-166). And appellees assert (Br. 18) that teenagers at the St. Margaret's school were taught material "tailored to Catholic theology," but there is conflicting evidence that a purely secular curriculum was taught at the school (R. 231, 90-92, 111).

Notwithstanding appellees' allegations to the contrary, the district court manifestly did *not* find that "HHS injected religious bias into the grant-making process" (Br. 7), or that its "funding decisions ensured that religions and religious viewpoints would be advanced" (*id.* at 9). Nowhere in its decision did the trial court find that the government "funded secular grantees to use religious means to achieve AFLA goals" (*id.* at 10), or that "AFLA programs with a distinctly religious slant were presented to public school students" (*id.* at 12). Appellees are likewise unable to locate any findings to support the claims that HHS "funded grantees to build upon existing religious programs" (*id.* at 13), that it "condoned the promotion of religious doctrine" (*id.* at 18), or that AFLA programs have conveyed to the public at large "that the government supports religion" (*id.* at 22). And the district court expressly *rejected* the contention (J.S. App. 13a-15a), renewed nevertheless by the appellees (Br. 26), that the AFLA promotes certain religious denominations at the expense of others.

It remains our view that the task of resolving these factual disputes belongs, in the first instance, to the district court. Some of the disputes turn on credibility judgments; others depend on the weight of sharply conflicting testimony and exhibits. The issue before this Court is to prescribe the appropriate legal standard for evaluating the evidence adduced on both sides. In our view, the district court failed at the legal threshold, and, by virtue of an erroneous legal premise, never made the factual determinations upon which a correct judgment must eventually depend.

2. Appellees have not shown an impermissible effect

As we explained in our opening brief, this Court has articulated a two-prong standard for determining whether government aid has the impermissible effect of establishing religion. "Aid normally may be thought to have a primary effect of advancing religion when it flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission or when it funds a specifically religious activity in an otherwise secular setting." *Hunt* v. *McNair*, 413 U.S. 734, 743 (1973). Because it applied a quite different "direct and immediate" test, however, the district court explicitly refused to conduct either of the inquiries required by *Hunt*.

Appellees apparently do not subscribe to the district court's novel approach, but they defend the result on three grounds. First, they contend (Br. 32-37) that the AFLA funds specifically religious activity and religious institutions. Second, they argue (*id.* at 37-41 & App. C) that, in any event, the *Hunt* factors do not apply at all where the statute itself imposes "no restriction on the ability of the[] grantees to use federal funds to further their own religious missions." Third, they argue (*id.* at 41-45) that the inquiry as to the pervasively sectarian character of individual grantees either has been adequately made, or need not be made at all. Appellees are mistaken on all counts.

a. Appellees ask this Court to conclude that AFLA funds are in fact "earmarked" for sectarian activities (Br. 32), thus violating the prohibition against using government money for specifically religious purposes. Throughout their brief (Br. 10, 24-26, 26 n.56, 29-30) appellees argue that the statute promotes religious ends simply by funding services that are consonant with particular religious beliefs, and that any involvement of religious groups in teaching or counselling about matters on which they have religious views—however those services may be carried out—necessarily violates the "effects" test and unlawfully discriminates against other religions whose beliefs are not consistent with the objectives of the statute.

Appellees likewise portray the AFLA program as a clumsy, but deliberate effort to enlist the prestige and resources of the government in the indoctrination of religion. Without citation, appellees depict the AFLA as "a religious crusade against adolescent 'promiscuity' and abortion" (Br. 1) that was "intended * * * to convey a message of government endorsement of religion" (*ibid.*). Congress is charged (*id.* at 2) with having intended "to inject religious values and the power of religion into AFLA programs"—a proposition that even the district court could not accept (see J.S. App. 17a-22a).[6] And appellees repeatedly but misleadingly assert (Br. 2, 2 n.4, 3, 3 n.7) that the AFLA *requires*, not simply permits, grantees to involve religious organizations in the provision of funded services—a legal conclusion which they erroneously ascribe (*id.* at 3 n.7) to the district court,[7] and in support of which they cite (*id.* at 3) a willfully bowdlerized version of one of the statutory provisions.[8]

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[6] Amici Unitarian Universalist Association, et al. go further and assert (Br. 10-19) that in enacting the AFLA Congress impermissibly discriminated among religions by offering funds only to those groups that were prepared to abide by the statutory restrictions on abortion counseling. The district court correctly rejected that contention (J.S. App. 13a-15a). Unlike the statute invalidated in *Larson* v. *Valente*, 456 U.S. 228 (1982), the AFLA does not make any "explicit and deliberate distinctions" (456 U.S. at 246-247 n.23) among religious institutions. Rather, it makes funds neutrally available to any group that is prepared to abide by the terms of the statute. The fact that some religious groups, as a matter of faith, cannot, or will not, participate in AFLA programs does not amount to a "denominational preference[] of the sort consistently and firmly deprecated in [the Court's] precedents" (*id.* at 246 (footnote omitted)). To the contrary, like the "conscientious objector" exemption upheld in *Gillette* v. *United States*, 401 U.S. 437 (1971), and the Sunday closing law upheld in *McGowan* v. *Maryland*, 366 U.S. 420 (1961), the AFLA has, at most, a " 'disparate impact among religious organizations' " that " 'result[s] from application of secular criteria' " (*Larson*, 456 U.S. at 246-247 n.23 (citation omitted)). As such, it is constitutionally permissible.

[7] In fact, the district court correctly construed Section 300z-5(a)(21) of the Act simply to "permit[] the involvement of religious organizations" in AFLA programs (J.S. App. 40a).

[8] Appellees misquote Section 300z-2(a) through the artful use of ellipsis. In their version, that provision is made to read: "[d]emonstration projects

Insofar as appellees mean to suggest that Congress cannot constitutionally enact programs that embody value judgments that are consonant with the tenets of particular religions, they are plainly wrong. Certainly the Establishment Clause does not invalidate statutory programs on the ground that the actions they direct also further goals of certain religions but not others. To the extent appellees are arguing that the involvement of any religiously affiliated organization in the AFLA program is itself an improper advancement of religion, they are equally incorrect. Outside the unique context of pervasively sectarian institutions, this Court's cases do not justify the extravagant (and possibly unconstitutional) presumption that persons will misuse grant monies simply because they have an affiliation with a particular religion.

Appellees' contrary assertion is not materially strengthened by the fact that, on isolated occasions, some religious allusions may have been made in a small number of AFLA programs. Aberrational examples do not amount to "specifically religious activity" under the Establishment Clause (see, *e.g.*, *Roemer* v. *Maryland Pub. Works Bd.*, 426 U.S. 736, 758 (1976)), and, in any event, the trial court made virtually no findings on any of the factual allegations reproduced by appellees. Beyond that, even if a small number of programs were constitutionally infirm—a determination that must await a detailed consideration of all of the evidence bearing on each of the individual grantees--that could hardly justify a facial invalidation of the statute.

b. Appellees next claim that, in any event, the statute is unconstitutional because it does not contain an explicit prohibition on the use of funds for sectarian purposes. Such a conclusion is

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shall . . . make use of support systems such as other family members, friends, *religious* and charitable organizations, and voluntary associations" (Br. 3 (emphasis in original)). This expedient use of ellipsis spares the reader the burden of dealing with the more complex—and very different—language that actually appears in the statute. The statute does *not* say that projects shall make use of support systems such as religious groups, but rather that they "shall use such methods as will strengthen the capacity of families to deal with the sexual behavior, pregnancy, or parenthood of adolescents and to make use of support systems," including religious organizations.

unwarranted. The AFLA contains clear directives on how grants are to be used, and none of the statutory objectives involves religious indoctrination or other sectarian uses. The fact that the AFLA (or any other statute) does not expressly forbid the use of funds for unconstitutional purposes cannot be dispositive. It is certainly not reasonable to infer that Congress intended either to authorize uses different from the ones it explicitly provided for, or to allow the authorized functions to be carried out in a manner inconsistent with the Establishment Clause.

Bradfield v. *Roberts*, 175 U.S. 291 (1899), makes clear that a federal statute does not violate the Establishment Clause simply because it lacks a clause expressly forbidding the use of funds for religious purposes. In that case, a federal statute authorized building funds to be paid to a hospital previously incorporated "for the care of such sick and invalid persons as may place themselves under treatment and care of said corporation" (175 U.S. at 292). Although it assumed that the hospital was operated under the auspices of the Catholic Church and by members of a Church order, the Court found no constitutional infirmity in light of the statute's secular objectives. While "the influence of any particular church may be powerful over the members of a non-sectarian and secular corporation," the Court observed, "its powers, duties and character are to be solely measured by the charter under which it alone has any legal existence" (*id.* at 298). The Court did not insist on a specific provision prohibiting religious use of the appropriated funds. Rather, it relied on the charter of the hospital itself, whose " 'specific and limited object' " was "the opening and keeping [of] a hospital in the city of Washington for the care of such sick and invalid persons as may place themselves under the treatment and care of the corporation" (*id.* at 299-300).[9]

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[9] Appellees assert that *Tilton* v. *Richardson*, 403 U.S. 672 (1971) (plurality opinion), "insist[s] on *statutory* safeguards" (Br. 39 (emphasis in original)), but nothing in the decision stands for that proposition. Moreover, the infirmity in the statute in *Tilton* was that the specific prohibition on religious use was limited to 20 years, suggesting that thereafter the religious institutions could devote buildings built with government funds to religious instruction or

Moreover, in administering the statute, the Secretary has incorporated in every grant award since 1984 (which includes all presently funded projects) an explicit prohibition on religious indoctrination. See J.A. 757, 759, 761. In light of that administrative practice, it cannot possibly make a difference of constitutional proportions that the statute itself lacks a similiar prohibition. The effects test focuses on the risk that funds will be channeled to sectarian purposes. It should make no difference whether a grantee is instructed by the Secretary to eschew religious indoctrination, or is so directed by the statute itself. Indeed, there are good reasons to believe that administrative oversight is more likely to ensure compliance with such strictures than the simple fact that the governing statute contains a restrictive clause. Individual grantees must deal with an administrator when they initially apply for a grant, when they receive their funding, and when they seek a renewal of the grant. That relationship is far more likely to deter abuses in the program than the simple presence of a prohibitory clause in the statute. Not surprisingly, this Court has consistently looked not only to the statute itself but also to provisions for administrative oversight in assessing the risk that government funds will be devoted to sectarian ends. See, *e.g.*, *Roemer* v. *Maryland Pub. Works Bd.*, 426 U.S. 736, 741-743, 760-761 & n.22 (1976) (plurality opinion); *Hunt* v. *McNair*, 413 U.S. 734, 739-740, 744-745 (1973); *Tilton* v. *Richardson*, 403 U.S. 672, 675, 680 (1971) (plurality opinion).[10]

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worship (see 403 U.S. at 683). By contrast, the AFLA imposes a continuing obligation to use the appropriated funds for the secular purposes articulated in the statute.

[10] Appellees insist (Br. 39) that the prohibition in the grant awards on "teaching or promotion of religion" is too narrow to ensure secular use of AFLA funds. We see no meaningful difference between that formulation and the statutory prohibitions approved by this Court in *Tilton* (see 403 U.S. at 675), *Hunt* (see 413 U.S. at 736-737), or *Roemer* (see 426 U.S. at 740-741). This Court has generally assumed that grantees will act in good faith and "give a wide berth" to grant restrictions, in order to "minimize constitutional questions" (*Roemer*, 426 U.S. at 760 (footnote omitted)). There is no reason to depart from that presumption in the present case.

c. Appellees turn, finally, to the question that the district court should have addressed at the outset, but never did – whether AFLA funds have "flow[ed]" to pervasively sectarian institutions (*Hunt*, 413 U.S. at 743). They seek to deal with that question in two ways. First, they propose their own findings of fact (Br. 42-44) – claiming that at least three AFLA grantees were pervasively sectarian – and ask this Court to ratify those findings as if they had issued from the district court. Second, appellees contend that it is not necessary under this Court's cases to decide whether individual grantees are pervasively sectarian, because no such "detailed itemization" has been required under this Court's cases (*id.* 45), and because the mere possibility that pervasively sectarian institutions *could* be funded under the AFLA is enough to invalidate the statute (*ibid.*).

Except in passing, the trial court failed to consider the sectarian nature of individual grantees, and it did not identify a single grantee, sub-grantee, or unpaid participant in an AFLA program that it found to be pervasively sectarian.[11] Appellees ask this Court to make its own findings, at least with respect to three AFLA grantees. That task obviously belongs to the trial court in the first instance, since the underlying facts remain sharply in dispute. Moreover, even were three of the AFLA grantees pervasively sectarian, that would hardly justify the conclusion that "no set of circumstances exists under which the Act would be valid." *United States* v. *Salerno*, No. 86-87 (May 26, 1987), slip op. 5.

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[11] Appellees make an unavailing effort (Br. 43 & n.88) to locate findings in the district court opinion concerning the extent to which individual grantees were pervasively sectarian. The selected quotations demonstrate that the court regarded the entire inquiry as irrelevant in light of the "direct and immediate" standard. Typical of the district court's "findings" on this issue is the following remark (J.S. App. 33a (quoted in Br. 43 n.88)): "While the Court will not engage in an exhaustive recitation of the record, references to representative portions of the record reveal the extent to which the AFLA has in fact 'directly and immediately' advanced religion, funded 'pervasively sectarian' institutions, or permitted the use of tax dollars for education and counseling that amounts to the teaching of religion."

Appellees next contend that the "pervasively sectarian" inquiry is unnecesary, because "this Court has never required such a detailed itemization" (Br. 45), and because the mere possibility that a pervasively sectarian institution *might* be funded is sufficient to strike down the AFLA on its face (*ibid.*). But this Court has indeed insisted on a detailed, case-by-case inquiry, explaining that in order "[t]o answer the question whether an institution is so 'pervasively sectarian' that it may receive no direct state aid of any kind, it is necessary to paint a general picture of the institution, composed of many elements" (*Roemer*, 426 U.S. at 758). See *id.* at 755-758; *Hunt*, 413 U.S. at 743-744; *Tilton*, 403 U.S. at 680.[12] Accordingly, the mere possibility that a grant program involving religious organizations *may* be misdirected "cannot, standing alone, warrant striking down a statute as unconstitutional" (*Tilton*, 403 U.S. at 679). As a plurality of this Court explained in the *Roemer* case, "[i]t has not been the Court's practice, in considering facial challenges to statutes of this kind, to strike them down in anticipation that particular applications may result in unconstitutional use of funds" (426 U.S. at 761).

3. Appellees have not shown excessive entanglement

We demonstrated in our opening brief that the district court's failure to consider the sectarian nature of the individual AFLA

[12] Appellees read (Br. 45) *Meek* v. *Pittenger*, 421 U.S. 349 (1975), as authority for the proposition that the sectarian nature of individual grantees, or even the grantees as a whole, need not be established with the usual rigor required when a finding has constitutional implications. The case says no such thing. In striking down programs that provided teaching material and auxiliary services to nonpublic elementary and secondary schools, the Court observed that "more than 75%" of the schools were church-related or religiously affiliated and had a "predominant[ly] sectarian character" (421 U.S. at 364 (footnote omitted)). The Court explained (*id.* at 366) that "the primary beneficiaries" of the programs "typify • • • religion-pervasive institutions," and held (*ibid.*) that "[s]ubstantial aid to the educational function of such schools, accordingly, necessarily results in aid to the sectarian school enterprise as a whole." Plainly, no such findings have been, or, we contend, could be made, in the present case.

programs fatally impairs its decision on entanglement. That is true, we contended, for two reasons: first, because outside the context of pervasively sectarian institutions, monitoring by the government to ensure compliance with the terms of a grant is simple monitoring, not entanglement; and second, because only pervasively sectarian institutions are likely to require the extensive degree of monitoring that this Court has held to be constitutionally impermissible. Accord *Florey* v. *Sioux Falls School Dist. 49-5*, 619 F.2d 1311, 1318 (8th Cir.), cert. denied, 449 U.S. 987 (1980).

Appellees do not dispute, nor could they, the fact that the sectarian nature of a grantee is a "critical element[]" of the entanglement inquiry. *Aguilar* v. *Felton*, 473 U.S. 402, 412 (1985). Moreover, while appellees are surely correct in observing that "the degree of sectarianism of an institution is to be considered 'cumulatively' " with other factors (Br. 46 (citation and emphasis omitted)), it does not follow that where there is no pervasively sectarian institution a finding of entanglement is nonetheless possible. Indeed, appellees do not point to any case in which this Court has found excessive entanglement outside the context of a pervasively sectarian institution. And appellees are further stymied by the fact that the district court did not even attempt to make findings on the sectarian characteristics of the grantees, so that a "cumulative" analysis of the individual grantees could be undertaken.

As before, appellees ask this Court to do the work of the trial court. They argue, for example, that "[t]he degree of sectarianism of an institution must be assessed in light of its religious tenets governing the aid at issue" (Br. 47), and they proceed to make a series of assertions about the sectarian characteristics of particular AFLA participants. It is these very assertions, however, that the litigation is about, and which the trial court found it unnecessary to resolve.[13]

[13] Appellees' assertion (Br. 51-53) that the AFLA has proved to be "political[ly] divisive[]" is unavailing, in light of this Court's holding in *Mueller* v. *Allen*, 463 U.S. 388, 403-404 n.11 (1983), that that concern "must be regarded as confined to cases where direct financial subsidies are paid to parochial schools or to teachers in parochial schools."

B. The References in the AFLA to Religious Organizations, if Unconstitutional, Were Correctly Held to be Severable from the Other Provisions of the Act

If the Court concludes that the AFLA is unconstitutional insofar as it refers to "religious organizations," we believe that the district court's decision severing those references from the balance of the Act should be affirmed. A court should refrain from invalidating more of a statute than is necessary. " ' "Unless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law." ' " *Alaska Airlines, Inc.* v. *Brock*, No. 85-920 (Mar. 25, 1987), slip op. 5 (citations omitted). Accord *Regan* v. *Time, Inc.*, 468 U.S. 641, 653 (1984) (plurality opinion); *INS* v. *Chadha*, 462 U.S. 919, 931-932 (1983); *Buckley* v. *Valeo*, 424 U.S. 1, 108 (1976) (per curiam); *Champlin Refining Co.* v. *Corporation Comm'n*, 286 U.S. 210, 234 (1932). " ' "[W]henever an act of Congress contains unobjectionable provisions separable from those found to be unconstitutional, it is the duty of this court to so declare, and to maintain the act in so far as it is valid" ' " (*Alaska Airlines*, slip op. 5 (citations omitted)). The district court correctly concluded (J.S. App. 52a-54a) that the references in the AFLA to "religious organizations" are severable from the balance of the statute.

1. Absent a clearly expressed legislative intention to the contrary, the language of a statute must ordinarily be regarded as conclusive. *Consumer Product Safety Comm'n* v. *GTE Sylvania, Inc.*, 447 U.S. 101, 108 (1980). Here, the language of the AFLA leaves no doubt that absent the references to "religious organizations," the balance of the statute is assuredly "legislation that Congress would * * * have enacted" (*Alaska Airlines*, slip op. 7).[14]

[14] Although there is no severability clause in the AFLA, that fact "does not raise a presumption against severability" (*Alaska Airlines*, slip op. 7). Accord *Tilton* v. *Richardson*, 403 U.S. 672, 684 (1971) (plurality opinion); *United States* v. *Jackson*, 390 U.S. 570, 585 n. 27 (1968). For reasons that are difficult to fathom, cross-appellants regard the absence of a severability clause as

The AFLA refers to "religious organizations" only four times (see 87-431 J.S. App. 53a; Appellant's Br. 3-4).[15] Two of those references appear in congressional findings that simply state that the problem of adolescent pregnancy is best addressed through a wide array of institutions – including, but not limited to, religious organizations. See 42 U.S.C. 300z(a)(8)(B), and 300z(a)(10)(C).[16] Although those findings (taken in conjunction with the many other findings articulated in the statute, see generally 42 U.S.C. 300z), generally identify the concerns that persuaded Congress to enact the legislation, the findings have no independent operational significance. Thus, if the findings were stripped of their passing references to "religious organizations," the remaining statute would obviously "function in a *manner* consistent with the intent of Congress" (*Alaska Airlines*, slip op. 6 (emphasis in original)). Cf. *Pennhurst State School & Hosp.* v. *Halderman*, 451 U.S. 1, 23 (1981) (findings expressed in Developmentally Disabled Assistance and Bill of

evidence that "Congress intended religion to be an inseparable part of the AFLA" (Br. 59 n.118).

[15] Those four isolated references are a far cry from appellees' assertion (Br. 58 n.117) that "[t]he inclusion of religious organizations is interwoven throughout the AFLA."

[16] Section 300z(a)(8)(B) provides in part:

> The Congress finds that [the problems of adolescent premarital sexual relations, pregnancy, and parenthood] * * * are best approached through a variety of integrated and essential services provided to adolescents and their families by other family members, religious and charitable organizations, voluntary associations, and other groups in the private sector as well as services provided by publicly sponsored initiatives.

Section 300z(a)(10)(C) provides in part:

> The Congress finds that * * * services encouraged by the Federal Government should promote the involvement of parents with their adolescent children, and should emphasize the provision of support by other family members, religious and charitable organizations, voluntary associations, and other groups in the private sector in order to help adolescents and their families deal with complex issues of adolescent premarital sexual relations and the consequences of such relations.

Rights Act, 42 U.S.C. (1976 ed. & Supp. III) 6000 *et seq.*, "represent general statements of federal policy, not newly created duties").

The third reference to "religious organizations" appears in 42 U.S.C. 300z-2(a), which provides that "[d]emonstration projects shall use such methods as will strengthen the capacity of families to deal with the sexual behavior, pregnancy, or parenthood of adolescents and to make use of support systems such as other family members, friends, religious and charitable organizations, and voluntary associations." This provision makes no reference to the participation of religious organizations in AFLA programs; rather, it states that funded projects shall use methods that enhance "the capacity of families" to draw on "support systems," including, but not limited to, religious organizations. "With this subsidiary role allotted" to religious organizations in Section 300z-2(a) (*Alaska Airlines*, slip op. 9), it cannot be supposed that Congress would have declined to enact the statute had it known that this incidental reference to "religious organizations" would be struck down. See pp. 7-8 & n.8, *supra*.

The fourth and final reference to "religious organizations" appears in Section 300z-5(a)(21)(B), which is the only provision in the entire AFLA that actually indicates that religious organizations may themselves participate in funded programs. Section 300z-5(a)(21)(B) provides that applications for AFLA grants shall include "a description of how the applicant will, as appropriate in the provision of services * * * involve religious and charitable organizations, voluntary associations, and other groups in the private sector as well as services provided by publicly sponsored initiatives." In two respects, the language confirms that Congress would have enacted the balance of the statute without this final reference to "religious organizations." First, prospective grantees are not *obligated* to involve religious organizations; they need only describe how they intend to involve those organizations "as appropriate." Accord R. 111, 19-21.[17] Second, religious organizations are included—as they

[17] Relying on the district court opinion and on a Senate Report, cross-appellants contend that under Section 300z-5(a)(21) "grantees do not have a choice about whether to involve religious organizations" (Br. 3 n.7). Neither authority supports that conclusion. Indeed, the district court correctly construed Section 300z-5(a)(21) simply to "permit[] the involvement of religious organizations" (J.S. App. 40a). And while there is some passing language in the 1984 Senate Report accompanying the re-authorization of AFLA funding (S. Rep. 98-496, 98th Cong., 2d Sess. 9-10 (1984)) suggesting that religious groups are required to be included in the program, the Conference Committee made clear that this Report should "not be considered as legislative history for the purposes of interpreting * * * the intention of the Congress with regard to * * * the Adolescent Family Life Act." H. R. Conf. Rep. 98-1154, 98th Cong., 2d Sess. 3 (1984).

are elsewhere (see 42 U.S.C. 300z(a)(8)(B), 300z(a)(10)(C), 300z-2(a))—as only one among "a wide array of educational, health, and supportive services" (42 U.S.C. 300z(a)(9)) whose combined efforts were required to deliver care and prevention services to adolescents in need. There is no reason to believe that Congress would have rejected the AFLA had it known that one aspect of that "wide array" would later be declared unconstitutional.[18] As a plurality of this Court observed in *Tilton* v. *Richardson*, 403 U.S. at 684 (footnote omitted), "[i]n view of the broad and important goals that Congress intended this legislation to serve, there is no basis for assuming that the Act would have failed of passage without this provision; nor will its excision impair either the operation or administration of the Act in any significant respect."[19]

[18] The Court has explained that where the valid remainder of a statute is "'fully operative as a law'" the invalid provision "is further presumed severable" (*Chadha*, 462 U.S. at 934, quoting *Champlin*, 286 U.S. at 234). The district court correctly determined (87-431 J.S. App. 54a) that "AFLA is fully and constitutionally operative as law in a manner consistent with the intent of Congress absent its references to 'religious organizations.'"

[19] In other Establishment Clause cases, the Court has refused to sever unconstitutional provisions only where the lawful portions of the statute were so "minor" that it could not be "assume[d] that the [legislature] would have passed the law solely to provide such aid." *Meek* v. *Pittenger*, 421 U.S. 349, 371 n.21 (1975). Accord *Sloan* v. *Lemon*, 413 U.S. 825, 833-834 (1973) (footnote omitted) (where "so substantial a majority" of the beneficiaries of state funding program were pervasively sectarian, "it could not be assumed that the state legislature would have passed the law to aid only those attending the relatively few nonsectarian schools").

2. The legislative history of the AFLA confirms the lesson of the text. As the district court explained (87-431 J.S. App. 54a), religious organizations were mentioned in the legislative history only once and, even then, only in the context of a broader discussion of the need for "community involvement" in AFLA programs. S. Rep. 97-161, 97th Cong., 1st Sess. 15-16 (1981). The Senate Report makes clear that "[r]eligious affiliation is not a criterion for selection as a grantee" (*id.* at 16). Rather, the Report emphasizes, religious organizations are included in the statute as "a simple recognition that nonprofit religious organizations have a role to play in the provision of services to adolescents" (*ibid.*).

The fact that Congress substituted the AFLA for the Health Services and Centers Amendments of 1978, Pub. L. No. 95-626, Tit. VI, 92 Stat. 3595, and added, inter alia, an explicit reference in the statute to religious organizations, does not change the analysis. As we explained in our opening brief (at 23-24), and as the district court found (J.S. App. 21a), the AFLA amended Title VI to add references not only to religious organizations but also to "families, charitable organizations, voluntary associations, and other groups" (*ibid.*). Religious organizations were to be only one among many participants in AFLA programs; and there is utterly no evidence to support cross-appellants' assertion (Br. 58) that "[a] primary reason that Congress enacted the AFLA to replace Title VI was to inject the teaching of certain religiously sensitive values about sexuality and involve religious organizations in the teaching of those values." Cross-appellants have not carried the considerable burden of showing that it is "evident that the Legislature would not have enacted" the balance of the AFLA without the references to religious organizations.

CONCLUSION

For the foregoing reasons, and for the reasons stated in our opening brief, the judgment of the district court declaring the AFLA unconstitutional "insofar as the statute involves 'religious organizations' " (J.S. App. 46a) should be reversed. If the Court affirms that judgment, however, the further judgment of the district court severing those references from the balance of the statute should be affirmed.

Respectfully submitted.

CHARLES FRIED
Solicitor General
JAMES M. SPEARS
Acting Assistant Attorney General
DONALD B. AYER
Deputy Solicitor General
ROBERT J. CYNKAR
Deputy Assistant Attorney General
LAWRENCE S. ROBBINS
Assistant to the Solicitor General
MICHAEL JAY SINGER
THEODORE C. HIRT
JAY S. BYBEE
Attorneys

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

OTIS R. BOWEN, Secretary of Health and Human Services,
Appellant,

—v.—

CHAN KENDRICK, et al.,
Appellees.

OTIS R. BOWEN, Secretary of Health and Human Services,
Appellant,

—v.—

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Cross-Appellants,

—v.—

OTIS R. BOWEN, Secretary of Health and Human Services,
Cross-Appellee.

UNITED FAMILIES OF AMERICA,
Appellant,

—v.—

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CROSS-APPELLANTS' REPLY BRIEF

BRUCE J. ENNIS, JR.
Ennis, Friedman & Bersoff
1200 17th Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 775-8100

JANET BENSHOOF
(Counsel of Record)
LYNN M. PALTROW
DAWN JOHNSEN
NAN D. HUNTER
RACHAEL N. PINE
American Civil Liberties Union
Foundation
132 W. 43rd Street
New York, New York 10036
(212) 944-9800

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I. THE SEVERABILITY ISSUE IS PROPERLY BEFORE THIS COURT

The undisputed facts presented in appellees' main brief make plain that the excision of the references to religious organizations in the AFLA would fundamentally alter the remaining provisions of the statute and the experimental purpose of this demonstration Act. Furthermore, the undisputed record reveals that the mandate for religious involvement and the promotion of religious beliefs permeates the entire administration and operation of the Act, indicating that HHS itself viewed the role of religious organizations as central to the legislation, consistent with the clear legislative intent. And finally, the facts revealed that the HHS Notice of Grant Award condition prohibiting the "promotion of religion" did not in fact provide any assurance that federal taxpayer dollars would not be used to advance religion, and therefore only a new "AFLA," which only *Congress* has the power to rewrite, could ensure the constitutionality of the Act.

Faced with the overwhelming and uncontroverted record, appellants respond by suggesting that it is premature for this Court to reach the severability issue.[1] They argue that "proper resolution of this case awaits evaluation of a complex factual record," Gov. Reply Br. 2, and that a remand is necessary before this Court can review the district court's orders, including its order on severability. As appellees will demonstrate, these claims are without merit.

Although the government seems to go back and forth on whether the extensive facts presented by appellees about the

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1 Appellees have standing to challenge the district court's severability decision as well as the statute itself. The government attempts to challenge standing in two footnotes, Gov. Br. 31 n. 24, Gov. Reply Br. 2 n.2, despite the district court's ruling, J.S. App. 8a-12a, and this Court's ruling in *Flast v. Cohen*, 392 U.S. 83 (1968), left unchanged as to Establishment Clause cases by *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464 (1982). Their claim that *Valley Forge* precludes appellees' as applied challenge is clearly wrong in light of *Aguilar v. Felton*, 473 U.S. 402 (1985). In *Aguilar* this Court upheld an as applied challenge under the Establishment Clause to Title I, 92 Stat. 2153, *as administered* by New York State. *Id.* at 407.

original AFLA grantees are even relevant,[2] the government now demands complete fact-finding on all grantees past and present.[3] The government claims that such determinations are necessary to establish whether there is a sufficient but unspecified quantity of "pervasively sectarian" grantees or "specifically religious activiti[es]," to justify the district court's conclusion that references to religious organizations must be severed and a prohibition of funding religious grantees written in. Gov. Reply Br. 8, 13. Appellants also claim that it would not be appropriate for this Court to make the additional factual determinations appellants view as necessary. *Id.* at 3, 11; Int. Reply Br. 4.

Although they filed cross-motions for summary judgment, appellants now further argue that summary judgment was not appropriate. *See* Gov. Reply Br. 5. However, under the well-

2 *See* Gov. Br. 33 n.26: "Unfortunately, the present record does not now permit such an individualized analysis, because all but one of the religiously affiliated groups analyzed by the district court are no longer receiving federal funds." The government's memorandum of points and authorities on summary judgment stated: "Moreover to the extent that plaintiffs rely on past administration of the Act or to grantee activities no longer occurring, such issues are irrelevant to the current administration." R. 181, Br. 3 n.1. In contrast, the government's reply brief discusses the need for an evaluation of "a complex factual record," apparently referring to the evidence on the 1981 and 1982 grantees presented in the district court. Gov. Reply Br. 2.

3 Unlike any other Establishment Clause case before this Court, this case involves grantees in over 40 states; this would require multiple depositions for each grantee and sub-grantee in forty different states from Pennsylvania to Alaska. Since HHS had little or no information or evidence about most of its grantees, appellees were forced to engage in an extensive discovery effort. *See* R.130, 3-8; R.126, 9-15; R.127; J.A. 745 (OAPP "does not require grantees to report the information about subgrant and subcontract arrangements"). Appellees' facts were based on four sets of interrogatories, three requests for production of documents and twenty-seven depositions of AFLA grantees and HHS officials. Since grantees were not parties to this suit, testimony had to be obtained by deposition subpoenas issued by federal district courts in the states where the non-party witnesses lived, and appellees even had to file a collateral appeal to the Fifth Circuit in order to obtain discovery material on one grantee. *Kendrick v. Heckler*, 778 F.2d 253 (5th Cir. 1985). The government's argument about the necessary fact-finding, if accepted, would set a precedent that would make the cost of Establishment Clause litigation prohibitive.

established legal standards governing summary judgment, the district court properly rested its constitutional determination on a record in which all material facts were undisputed. Furthermore, this Court has both the authority and the obligation to review the record and affirm that determination.

Rule 52(a) of the Federal Rules of Civil Procedure expressly makes factual findings unnecessary on summary judgment: "Findings of fact . . . are unnecessary on decisions of motions under Rules 12 and 56 or any other motion except as provided in Rule 41(b)." This is because only questions of law are presented on motions for summary judgment. *See, e.g., Itel Capital Corp. v. Cups Coal Co.*, 707 F.2d 1253, 1261 (11th Cir. 1983); *International Ass'n. of Machinists v. Texas Steel Corp.*, 538 F.2d 1116, 1119 (5th Cir. 1976), *cert. denied*, 429 U.S. 1095 (1977). In considering cross-motions for summary judgment in this case, the district court carried out its duty to determine whether there existed any genuine issue as to any material fact. Fed. R. Civ. P. 56. J.S. App. 7a-8a. The court's proper role, contrary to appellants' novel suggestions, *e.g.*, Gov. Reply Br. 2, 5, 11; Int. Reply Br. 3, 4, 6, is to review the record for any *genuine* factual disputes between the parties, *not* to resolve any existing disputes by making factual findings. *Anderson v. Liberty Lobby, Inc.*, 91 L. Ed. 2d 202, 212 (1986). As this Court stated, "[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge . . . [when] he is ruling on a motion for summary judgment . . . ." *Anderson*, 91 L. Ed. 2d at 216.

Although not required to do so, *see* 6 J. Moore, W. Taggart & J. Wicker, *Moore's Federal Practice* ¶ 56.02[11] (2d ed. 1987), the district court in this case described the reasons why it concluded that there was no genuine factual issue in dispute:

> It is evident from the extent of the record in this case and from the motions themselves that the parties have had more than ample opportunity to submit all material pertinent to a motion for summary judgment. . . . After carefully and exhaustively considering the motions, the statements of material facts not in dispute, the allegations of disputed facts, the golconda of documents submitted to

> the Court, and the case law, the Court finds that the material facts are not in dispute and that summary judgment is appropriate.

J.S. App. 7a-8a. The court went on to set forth examples of facts that it found to be undisputed about no less than eighteen participants in AFLA programs. *Id.* at 33a-38a.[4]

By stressing the need for new findings of fact, appellants may be arguing that summary judgment is inappropriate because material facts are disputed.[5] Yet the government itself stated in its motion for summary judgment that "[t]he parties are in agreement on certain basic facts, such as the fact that grants were made to religiously-affiliated institutions. . . . Where basic facts are undisputed and only ultimate facts are at issue, summary judgment is appropriate." R.181, Br. 3 n.1.[6] The government claimed to dispute a relatively small number of the facts, but, as the district court explicitly found, the government did not properly controvert most of those facts in accordance

4 Several appellate courts have reversed district courts that offered absolutely no indication of their basis for granting summary judgment. *See, e.g., Myers v. Gulf Oil Corp.*, 731 F.2d 281 (5th Cir. 1984) (sixty-five word order gave no basis for decision). Significantly, appellants' complaint is *not* that the district court inadequately explained its reasons for granting summary judgment; rather, they object that the court did not make detailed findings of fact, which is not required on summary judgment.

At least one court has stated that "it would be ill advised" for a district court to make specific findings on summary judgment because "[t]hey would carry an unwarranted implication that a fact question was presented." *A.R., Inc. v. Electro-Voice, Inc.*, 311 F.2d 508, 513 (7th Cir. 1962).

5 The intervenor argues in its reply brief that the facts cited in appellees' brief are "wholly immaterial." Int. Reply Br. 14. Appellees' facts might very well be immaterial if the intervenor's theory of the First Amendment were the law, which it clearly is not. The intervenor argues that severability would be inappropriate here because Congress would be constitutionally *required* to include religious organizations among those it funded to teach and counsel adolescents on issues of sexuality as long as Congress chose to fund any organizations to provide instruction or advice on this issue. Int. Reply Br. 16-18.

6 Similarly, the intervenor did not dispute appellants' facts submitted in the district court, but only challenged their legal significance under the Establishment Clause analysis. R. 162, Br. 6-9.

with Rule 56(e). J.S. App. 32a n.14.[7] Of the 1251 facts submitted by appellees, the government properly disputed only 36, leaving undisputed 97.8% of appellees' facts. J.A. 619; *see* J.S. App. 32a n.14.[8] Appellants may not dispute before this Court any fact that they failed to show was disputed in the district court.[9] *See, e.g., Franz Chem. Corp. v. Philadelphia Quartz Co.*, 594 F.2d 146, 150 (5th Cir. 1979) ("It is almost axiomatic that any genuine issue of fact must somehow be shown to exist at the district court level."). Even at this late date, appellants do not "dispute" any of the facts that were uncontroverted and presented to the district court.[10]

7 Rule 56(e) of the Federal Rules of Civil Procedure clearly states, and this Court recently reaffirmed, that "a party opposing a properly supported motion for summary judgment 'may not rest upon the mere allegations or denials of his pleadings, but . . . *must set forth specific facts* showing that there is a genuine issue for trial.' " *Anderson*, 91 L. Ed. 2d at 212 (emphasis added).

8 Appellees' facts were presented in a three-volume four-hundred page statement of undisputed material facts cross-indexed to a seven-volume 3,702-page appendix. This evidence consisted primarily of documentary evidence and depositions. Because a large portion of the depositions were of grantee witnesses over 100 miles from the courthouse, the court on remand would be confronted with the same evidence on the basis of which it already found no material dispute. Fed. R. Civ. P. 45(d)(2).

9 "[F]or an appellate court to permit appellant to assert on appeal a fact issue not raised in the trial court is destructive of orderly procedure and undermines the utility of Rule 56." Schwarzer, *Summary Judgment Under the Federal Rules: Defining Genuine Issues of Material Fact*, 99 F.R.D. 465, 493 (1984); *see also Founding Church of Scientology v. Smith*, 721 F.2d 828, 831 (D.C. Cir. 1983) ("Plaintiff has not contested this finding on appeal, nor indeed did it dispute the . . . evidence of sensitivity during the summary judgment proceedings in District Court."); *Sound Ship Building Corp. v. Bethlehem Steel Co.*, 533 F.2d 96, 101 n.3 (3rd Cir.) ("The presence or absence of genuine issues of material fact is to be gauged as of the time judgment was entered by the district court."), *cert. denied*, 429 U.S. 860 (1976).

10 Referring to the record readily establishes that not a single example in the government's reply brief constitutes an actual dispute. *See* Gov. Reply Br. 3, 4 n.5. For example, our reference to CHCHC's "Family Sunday" was hardly "baseless." *Id.* at 4 n.4. On the contrary, affiant Little admitted it was part of their application, but stated it "has not occurred." R. 181, Little Decl. ¶ 13. Instead, it was replaced by a "Day of the Family" which always

Moreover, appellees produced undisputed evidence of actual advancement of religion to a greater degree than any other Establishment Clause case reviewed by this court.[11] Even if the government had disputed 80% of plaintiffs' facts instead of 3%, the government still would had to have shown that the resolution of facts in their favor would have changed the outcome

occurs on a Sunday. Contrary to the government's assertion, Little admits that AFLA funds *were* used to promote the event. *Id.* at ¶ 14. And ministers were not merely "asked to mention the event," Gov. Reply Br. 4 n.4, but rather "announce[d] the Day of the Family program at their Sunday services" and "delivered a message on the importance of the family." R. 181, Little Decl. ¶ 13. The government also attempts to create factual disputes by mischaracterizing appellees' position. Thus, the government alleges a dispute over whether medical care at St. Margaret's was "inappropriate." Gov. Reply Br. 4 n.5. Yet our affiants' allegations were hardly so vague. Rather, Dr. Laz precisely stated that care at St. Margaret's is dictated by religious directives, which prohibit doctors from "performing, prescribing, recommending or even referring for sterilization, abortion or contraception." J.A. 527. The government's affiant disputes neither claim, and in fact concedes that care is given "within the guidance of the religious directives." J.A. 678. Finally, the government alleges factual disputes where plainly none exist. We allege, for example, that Lyon County held several classes at churches and parochial schools. The government counters by citing to over 80 pages of documents—none of which dispute our claim. Gov. Reply Br. 4. As in the district court, the government's "disputes" are "unsupported disagreements," or "reference[s] to the page in the multi-volume record at which the Court [can] look up an undescribed disagreement and decide for itself whether the effort [is] worthwhile." J.S. App. 32a n.14.

11 This Court has invalidated statutes under the "effects" test nine times since 1971 and in none of these cases, even where the statute had been implemented, were any findings made that the federal or state money had actually been directly used to teach religion, faith or morals or advance the particular religious mission of a religious grantee. *See Grand Rapids School Dist. v. Ball*, 473 U.S. 373 (1985); *Larkin v. Grendel's Den Inc.*, 459 U.S. 116 (1982); *Wolman v. Walter*, 433 U.S. 229, 248, 254 (1977) (section on loans of instructional materials and section on field trips); *Meek v. Pittenger*, 421 U.S. 349, 365 (1975) (invalidating section on instructional materials); *Levitt v. Committee for Pub. Educ. & Religious Liberty*, 413 U.S. 472, 480 (1973); *Committee for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 774 (1973); *Sloan v. Lemon*, 413 U.S. 825 (1973); *Tilton v. Richardson*, 403 U.S. 672, 683 (1971) (one section invalidated); *Public Funds for Public Schools v. Marburger*, 358 F. Supp. 29 (D.N.J. 1973), *aff'd*, 417 U.S. 961 (1974).

of the case. Because of the cumulative nature of appellees' facts, the government could not have met this burden.

Appellees are not, as the government claims, proposing our "own findings of fact . . . and ask[ing] this Court to ratify those findings as if they had issued from the district court." Gov. Reply Br. 11; *see also* Int. Reply Br. 4. Rather, in order to assist this Court, we described some of the numerous *undisputed* facts that were established in the district court and are contained in the record. An appellate court reviewing a grant of a summary judgment motion applies the same standard as that applied by the trial court: "*[T]he reviewing court should evaluate the record* on an appeal from a summary judgment" in order to determine "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." 10 C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* § 2716, at 643 (1983) (quoting Fed. R. Civ. P. 56(c)) (emphasis added); *see also Anderson*, 91 L. Ed. 2d at 211-12 (applying this standard).[12] Thus, the district court's orders, both on summary judgment and severability, are properly before this Court, and remand is not appropriate.

II. THE DISTRICT COURT ACTED IMPROPERLY IN REWRITING THE AFLA

In keeping with cardinal principles of separation of powers, the judiciary is charged with enforcing the Constitution to its limits and the legislature with writing laws that conform to those limits. The district court properly found that the AFLA does not conform to the requirements of the Establishment Clause. Attempting, however, to "refrain from invalidating more of the [AFLA] than is necessary," the district court severed out the AFLA's references to religious organizations. Cr.

12 Where a trial court has chosen to make determinations as to which facts are undisputed, such findings are not protected by the "clearly erroneous" rule on appellate review. 9 C. Wright & A. Miller, *Federal Practice and Procedure* § 2575, at 693 (1971). "The district court's order granting a summary judgment motion is not a discretionary decision and thus will be independently reviewed by the appellate court." *Wong v. Bailey*, 752 F.2d 619, 621 (11th Cir. 1985) (citing *Federal Deposit Ins. Corp. v. Dye*, 642 F.2d 837, 841 (5th Cir. Unit B 1981)).

J.S. App. 3a.[13] Recognizing, however, that mere severance was not enough to ensure constitutionality, the court rewrote[14] the statute by prohibiting funding to "religious organizations" as defined in the court's opinion, federal statutes and regulations, and by the government itself. Cr. J.S. App. 6a-7a.[15] The AFLA's language, its legislative history, and the "undisputed record" of six years of unconstitutional government sponsorship of religion establish beyond a doubt that rewriting the AFLA in this way was contrary to legislative intent. Congress, and not the courts, has the power to write a new statute, if it so desires, to replace the AFLA. "[I]t is for Congress to determine the proper manner of restructuring the [invalidated statute] . . . in the way that will best effectuate the legislative purpose." *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 88 n.40 (1982).[16]

This Court has long held that courts may not rewrite legislation by inserting statutory limitations in order to cure statutory defects. As explained in *Hill v. Wallace*, 259 U.S. 44 (1922), a statute is nonseverable if it requires "inserting limitations it does not contain. This is legislative work beyond the power and

13 Citations to the district court's order will be to the Appendix of Appellees' Jurisdictional Statement in the form "Cr. J.S. App."

14 The intervenor states at three separate points in two pages of its reply brief that the district court rewrote the AFLA by severing the Act. Int. Reply Br. 16-17. Given this, we do not understand, nor does the intervenor explain, why its opposition to severability is limited to constitutional grounds. *Id.*

15 Only by willful misinterpretation can the intervenor suggest that the injunction applies to organizations "*solely* on the basis of religious belief or affiliation." Int. Reply Br. 1 (emphasis added). The court's ruling on the Rule 59(e) motion makes clear that to be disqualified, organizations must have a religious character that would create the risk of an establishment clause violation as defined in the district court's opinion and the Supreme Court opinions cited therein.

16 *See also Califano v. Westcott*, 443 U.S. 76, 94-95 (Powell, J., concurring in part and dissenting in part) ("[The Court] should not use its remedial powers to circumvent the intent of the legislature. . . . Rather than . . . rewriting [the statute], we should leave this task to Congress."), *aff'd on rehearing*, 443 U.S. 901 (1979).

function of the court." *Id.* at 70, *cited in Alaska Airlines, Inc. v. Brock*, 94 L. Ed. 2d 661, 669 (1987). The Court concluded that this "would be to make a new law, not to enforce an old one. This is no part of our duty." 259 U.S. at 71 (quoting *United States v. Reese*, 92 U.S. 214, 221 (1876)). "[C]ourts addressing questions of severability should be guided by Chief Justice Taft's admonition 'that amendment may not be substituted for construction, and that a court may not exercise legislative functions to save [a] law from conflict with constitutional limitations.' " *Regan v. Time, Inc.*, 468 U.S. 641, 664 n.2 (1984) (Brennan, J., concurring in part and dissenting in part) (quoting *Yu Cong Eng. v. Trinidad*, 271 U.S. 500, 518 (1926)).[17]

III. REWRITING THE AFLA WOULD BE CONTRARY TO CONGRESSIONAL INTENT

This Court in *Alaska Airlines* described the "relevant inquiry in evaluating severability" as "whether the statute will function in a *manner* consistent with the intent of Congress." 94 L. Ed. 2d at 670 (emphasis in original).[18] The resulting statute must be "legislation that Congress would . . . have enacted." *Id.* If it is unclear whether Congress would have enacted a statute absent the severed provisions, "then the statute must fall." *El Paso Northeastern Ry. v. Gutierrez*, 215 U.S. 87, 97 (1909); *accord Butts v. Merchants & Marine Transp. Co.*, 230 U.S. 126, 137 (1913). This Court has also stated that when the unconstitutional and constitutional portions of a statute "are necessary parts of one system . . . the whole Act will fall *with the invalidity of one clause*. When there is no such connection and depen-

17 *See also Universal Amusement Co. v. Vance*, 587 F.2d 159, 172 (5th Cir. 1978) ("[W]e cannot judicially rewrite the Texas statutes and rules to incorporate the [constitutionally required] safeguards."); *United States v. McElroy*, 259 F.2d 927 (D.C. Cir. 1958) (citing "numerous instances in which the Supreme Court has held that such judicial reframing of legislation should not be attempted"), *aff'd*, 361 U.S. 281 (1960).

18 *See also City of New Haven v. United States*, 809 F.2d 900, 906 (D.C. Cir. 1987) ("[T]he ultimate inquiry in a severability case is not whether the statute may somehow continue to function after excision of the invalid portion, but rather whether it continues to function *in a manner consistent with Congressional intent*.") (emphasis in original).

dency the Act will stand . . . ." *Huntington v. Worthen*, 120 U.S. 97, 102 (1887) (emphasis added).[19]

"Absent a clearly expressed legislative intention to the contrary, the language of a statute must ordinarily be regarded as conclusive." Gov. Reply Br. 14 (citing *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)). The language of the AFLA leaves no doubt that Congress would *not* have enacted the AFLA absent the inclusion of religious organizations and that a severed AFLA would *not* operate in a manner consistent with Congressional intent. Congress discussed "religious organizations" at four separate points throughout the AFLA—twice in the congressional "findings and purposes" describing why Congress enacted the AFLA and twice in operational sections of the statute making religious organizations eligible for direct funding and requiring all grantees to include religious organizations in their funded programs. *See* Appellees' Br. 2-4. The placement and content of the four provisions at issue establish extensive "connection and dependency," *Huntington*, 120 U.S. at 102, between the references to religious organizations and the remainder of the statute, thus rendering the AFLA nonseverable.

The government's suggestion that the references to religious organizations in the congressional findings are not relevant to the severability determination, Gov. Reply Br. 15, is incredible given that Congressional intent controls whether a statute is severable. As the government itself states, the function of the congressional findings is to "identify the concerns that persuaded Congress to enact the legislation." *Id.*[20] The congressional "findings and purposes" described in the AFLA demonstrate that Congress' intent in replacing Title VI with the AFLA was to utilize religious organizations to promote their values. The AFLA findings indicate Congress' conclusion that "the problems of adolescent premarital sexual relations, pregnancy, and parenthood . . . are *best approached*" through services provided by religious organizations. 42 U.S.C. § 300z(a)(8)(A) to (B). Congress further found that AFLA services should "emphasize" support provided to adolescents by religious organizations. 42 U.S.C. § 300z(a)(10)(C).

Two additional provisions expressly provide for the involvement of religious organizations in AFLA programs. Section 300z-2(a) directs that "[d]emonstration projects *shall* use such methods as will strengthen the capacity of families to deal with the sexual behavior, pregnancy, or parenthood of adolescents and to make use of support systems such as other family members, friends, *religious* and charitable organizations, and voluntary associations." (Emphasis added). Section 300z-5(a)(21)(B) directs that every application for an AFLA grant "*shall* include" "a description of how the applicant will, as appropriate in the provision of services . . . involve *religious* and charitable organizations, voluntary associations, and other groups . . . ." (Emphasis added).

These provisions require every AFLA grantee to involve religious groups in its program, as is clear from the use of the word "shall" in each provision. *See, e.g., Manatu County v. Train*, 583 F.2d 179, 182 (5th Cir. 1978) ("Use of the word 'shall' generally indicates a mandatory intent unless a convincing argument to the contrary is made.") (quoting *Sierra Club v. Train*, 557 F.2d 485, 489 (5th Cir. 1977)). Although the provisions list several types of organizations in addition to religious groups, the organizations included are separated by the word "and," rather than "or," making the provisions mandatory as to all of the organizations listed. *E.g.*, New Hampshire Auto. Dealers Ass'n v. General Motors Corp., 620 F. Supp. 1150, 1157 (D.N.H. 1985) ("Where the conjunctive term 'and' is used in a statute . . . all of the requirements of the statute must be fulfilled."), *modified on other grounds*, 801 F.2d 528 (1st Cir. 1986).

The "as appropriate" in section 300z-5(a)(21)(B) refers to the way in which religious groups are included and not to whether

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19 *Accord Hill v. Wallace*, 259 U.S. 44, 70-72 (1922) (refusing to sever unconstitutional portions of a statute *despite* existence of a severability clause because invalid provisions were so interwoven with remaining Act); *Field v. Clark*, 143 U.S. 649, 695-96 (1892).

20 "*A fortiori* congressional purpose or declaration of policy set out in the preamble of a statute provides a sound and thoroughly acceptable basis for ascertaining the goals of the statute." *Globe Fur Dyeing Corp. v. United States*, 467 F. Supp. 177, 180 (D.D.C. 1978) (citing *U.S. Dept. of Agriculture v. Moreno*, 413 U.S. 528, 533-34 (1973)); *see also Tilton v. Richardson*, 403 U.S. 672, 678-79 (1971) (relying on stated legislative purpose in preamble of congressional statute to find legitimate secular purpose where statute was challenged on Establishment Clause grounds).

they are included at all.[21] This interpretation is strengthened by Congress' statutory finding that the involvement of religious groups in AFLA programs not only is "appropriate," but also should be "emphasize[d]," § 300z(a)(10)(C), and is among the "best approache[s]," § 300z(a)(8)(B), to addressing the goals of the AFLA.[22] Eliminating the participation of religious groups, as the district court did, directly conflicts with congressional intent and results in a statute very different from the one Congress enacted. The Senate Committee stated that, "[r]ecognizing the limitations of Government in dealing with a problem that has complex moral and social dimensions," it included "promoting the involvement of religious organizations in the solution to these problems . . . . " S. Rep. No. 161, 97th Cong., 1st Sess. 15-16 (1981). This Report also reveals that the Senate Committee decided to include religious organizations even though it realized that an Establishment Clause challenge was a possibility: "[P]rovisions for the involvement of religious organizations do not violate the constitutional separation between church and state." *Id.* at 15.

This Court has also considered subsequent agency action to help determine whether the statute should be severed. *See, e.g., Alaska Airlines*, 94 L. Ed. 2d at 672-73. Similarly, other courts considering whether to sever statutes have examined the manner in which the statutes operated. *See, e.g., Americans United for the Separation of Church & State v. Dunn*, 384 F. Supp. 714, 717, 721-22 (M.D. Tenn. 1974), *vacated for reconsideration in light of statutory amendments*, 421 U.S. 958 (1975); *Public*

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21 Even if participation by religious groups in AFLA programs was not mandatory, Congress clearly intended to encourage strongly such involvement by repeatedly singling out religious groups as particularly desirable participants. Under either interpretation, Congress intended religious groups to play a central and integral role under the Act.

22 It is a fundamental rule of statutory construction that statutory provisions are to be construed, not in isolation, but as a whole in light of both the language of the statute, *U.S. v. Morton*, 467 U.S. 822, 829 (1984), and the purpose and intent of the statute, *District of Columbia v. Carter*, 409 U.S. 418, 420 (1973). *See also Lehigh & New England Ry. v. I.C.C.*, 540 F.2d 71, 79 (3d Cir. 1976) ("[W]e have . . . used the preamble as a guide to aid us in determining the legitimate scope of . . . the operative language of [the statute].").

Funds for Public Schools v. Byrne, 444 F. Supp. 1228, 1229-30, 1232 (D.N.J. 1978), *aff'd*, 590 F.2d 514 (3rd Cir.), *aff'd mem.*, 442 U.S. 907 (1979). In both *Dunn* and *Byrne*, the courts examined the manner in which the statute operated and concluded that, if severed, the statute would operate in a fashion dramatically different from what the legislature intended. HHS has interpreted the AFLA as requiring all AFLA grantees to involve religous groups and has denied funding to applicants that have failed to describe adequate religious involvement. *See* Appellees' Br. 7, 8 & nn. 15, 16. Given the undisputed record that the AFLA has been promoting religion for over six years, it is clear that severance would dramatically transform the AFLA.[23]

IV. THE DISTRICT COURT'S ORDER REWRITING THE AFLA IS UNPRECEDENTED

The government seeks to minimize the involvement of religious groups in the AFLA by stating that the Act refers to religious organizations "only" four times. Gov. Reply Br. 15. Yet neither the government nor the intervenor has pointed to a single case in which a statute even mentions *once* the necessity of involving religious organizations in federally funded programs. Nor do they cite any case in which a court has both severed as many as four unconstitutional provisions that appeared throughout a statute and written a new limitation into the statute.

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23 The government argues that section 300z-2(a) "makes no reference to the participation of religious organizations in AFLA programs . . . ." Gov. Reply Br. 16. Yet it is difficult to imagine, and the government does not explain, how a grantee could "strengthen the capacity of families . . . to make use of . . . religious . . . organizations" without either involving religious groups or unconstitutionally promoting religious beliefs.

The government also argues that appellees "erroneously" state that the district court interpreted section 300z-5(a)(21)(B) as mandating the involvement of religious groups by all grantees; the government contends that the court stated that the AFLA simply permits religious involvement. Gov. Reply Br. 7 n.7. The government is mistaken on this point. The court construed this provision as follows: "Section 300z-5(21)(B) of the AFLA . . . further defines what types of institutions the AFLA benefits by *explicitly requiring* applicants to describe how they *will* involve '*religious organizations*' in their programs." J.S. App. 39a-40a (emphasis added).

Most important, in all of the cases cited by appellants where this Court found a statute to be severable, there was a *clear* legislative intent in favor of severability, which is absent here.[24] In addition, in many of those cases,[25] the statute in question contained a severability clause. *See INS v. Chadha*, 462 U.S. 919 (1983); *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam); *Champlin Refining Co. v. Corporation Comm'n*, 286 US. 210 (1932). The existence of a severability clause gives rise to a "presumption of severability." *Chadha*, 462 U.S. at 932.[26] Because it is an explicit statement of legislative intent, a severability clause precludes the need for the court to "embark on that elusive inquiry." *Id.* Thus, these cases are not persuasive authority for severing the AFLA, which does not contain a severability clause and the accompanying presumption as to legislative intent. Although the absence of a severability clause does not ordinarily give rise to the contrary presumption, against severability, the absence in the AFLA of *both* a severability clause *and* assurances of secular use of the funds is indicative of congressional intent and suggests a deliberate choice to

24 In fact in every case in which severability has been found by this Court, there was a clear legislative intent plus at least one of three factors, none of which is present in the AFLA. *See* Cr. J.S. 25-28.

25 The exceptions are *United States v. Jackson*, 390 U.S. 570 (1968) and *Alaska Airlines*, 94 L. Ed. 2d 661. In *Jackson*, this Court severed an unconstitutional death penalty clause from the remainder of the Federal Kidnapping Act. The Court found that "[i]ts elimination in no way alters the substantive reach of the statute and leaves completely unchanged its basic operation." 390 U.S. at 586. Upon reviewing the statute and its legislative history, the Court concluded that it was "inconceivable" that Congress would have preferred to have no kidnapping statute if it could not include the unconstitutional death penalty provision. *Id. Alaska Airlines* is discussed *infra* at 15-16. The government also cites the plurality opinion in *Tilton v. Richardson*, 403 U.S. 672 (1971), which is discussed *infra* at 18-19.

26 If "radical dissection" is necessary to preserve the statute, severance is inappropriate despite the presence of a severability clause. *Thornburgh v. American College of Obstetricians & Gynecologists*, 106 S. Ct. 2169, 2181 (1986) (citing *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 445 n.37 (1983)); *Hill v. Wallace*, 259 U.S. 44 (1922); *Railroad Retirement Bd. v. Alton R.R.*, 295 U.S. 330 (1935); *Williams v. Standard Oil Co.*, 278 U.S. 235 (1929).

give a reviewing court no mechanism for removing the religious component of the AFLA.

The only case cited by the district court as support for its severability determination is *Alaska Airlines*, 94 L. Ed. 2d 661. Although the statute in question there did not contain a severability clause, this Court found "abundant indication of a clear congressional intent of severability." *Id.* at 671. Much of that evidence of intent stemmed from the distinctive nature of the severed provision which was a legislative veto provision. As this Court stated, "a legislative veto [provision] . . . by its very nature is separate from the operation of the substantive provisions of a statute." For this reason, the Court found no risk that a court faced with an unconstitutional legislative veto would need to "rewrite" the severed statute to make it capable of functioning independently. *Id.*[27] By contrast, the unconstitutional references to religious organizations in the AFLA occur in four places throughout the Act and are all substantive in that they encouraged direct and extensive religious involvement in AFLA programs.

Furthermore, the statute in *Alaska Airlines* made "a major change and fundamental redirection" in the regulation of air transportation, 94 L. Ed. 2d at 667; *see also Buckley*, 424 U.S. at 7 (this Court severed provision from "by far the most comprehensive reform legislation [ever] passed by Congress concerning the election of the President, Vice-President, and members of Congress") (quoting Court of Appeals). The unconstitutional provision was a minor part of this comprehensive act and subjected only "insignificant" regulations to a veto, as the Court ascertained in part by examining the regulations that were actually proposed. The AFLA, on the other hand, is only a small demonstration project and clearly did not limit religious participation to "insignificant" portions of AFLA programs. Religious organizations were singled out as specifically desired grantees and were encouraged to participate in all phases of all AFLA programs. This Court in *Alaska Airlines* also noted that

27 Nevertheless, a court may not sever an unconstitutional legislative veto provision, even from a statute containing a severability clause, where to do so would be inconsistent with congressional intent. *See, e.g., City of New Haven v. United States*, 809 F.2d 900 (D.C. Cir. 1987).

a "report and wait" provision that would remain in the severed statute gave Congress an opportunity to oppose or influence new regulations before they went into effect, which "reduced any disruption of congressional oversight caused by severance of the veto provision." Obviously, if this Court rewrites the AFLA to prohibit the participation of religious organizations, that Act, which would be in direct conflict with congressional intent, would be effective immediately with no opportunity for congressional review.[28]

Appellants seek to minimize the significance of the AFLA's repeated references to religion by suggesting that religious organizations are just one of many groups listed in the statute. Int. Reply Br. 6; Gov. Reply Br. 18. But the presence of other groups, like the presence of schools in the statute at issue in *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982) does "not dilute [the statute's] forbidden religious classification." *Id.* at 120 (quoting Court of Appeals). In *Larkin*, the Court found unconstitutional a Massachusetts statute that vested in the governing bodies of churches *and* schools the power to veto applications for liquor licenses within a five hundred foot radius of the church or school. 459 U.S. at 117. Although the Court found that the statute "embrace[d] valid secular purposes," *id.* at 123, and even offered statutory schemes that might not offend the Establishment Clause, *id.* at 124, the Court found the delegation of power to the churches unconstitutional.[29] The Court declared the entire statute unconstitu-

28 The statute at issue in *Chadha*, 462 U.S. 919, was similar to the statute in *Alaska Airlines*. It also contained an unconstitutional legislative veto provision and contained what was essentially a "report and wait" provision that allowed for some congressional oversight. 462 U.S. at 925. In addition, as noted above, the statute in *Chadha* contained a severability clause. *Id.* at 932.

Although the unconstitutional provision in *Tilton*, 403 U.S. 672, was not a legislative veto, it was analagous to one in that it was a single, isolated provision that was not dependent on the other substantive sections of the statute.

29 The Court in reaching its conclusion noted that the liquor license statute, like the AFLA, contained no assurances to guarantee that religious organizations would act only to further the valued secular goals of the statute:

> The churches' power under the statute is standardless, calling for no reasons, findings, or reasoned conclusions. That power may therefore be used by churches to promote goals beyond insulating the church from undesirable neighbors; it could be employed for explicitly religious goals, for example, favoring liquor licenses for members of that congregation or adherents of that faith.

Larkin, 459 U.S. at 125.

tional and did not suggest that the statute could be severed or otherwise rewritten to permit schools to continue to have veto power over the location of liquor stores.

Other Establishment Clause cases also provide direct support against severing the AFLA. In *Sloan v. Lemon*, 413 U.S. 825 (1973), the Court invalidated under the Establishment Clause a state statute that reimbursed parents for a portion of tuition expenses incurred in sending their children to nonpublic schools. The Court was asked to treat the law as "containing a separable provision for aid to parents of children attending nonpublic schools that are not church related." 413 U.S. at 833. The Court refused this invitation and affirmed the lower court's finding that:

> in view of the fact that so substantial a majority of the law's designated beneficiaries were affiliated with religious organizations, it could not be assumed that the state legislature would have passed the law to aid only those attending the relatively few nonsectarian schools. . . . The statute nowhere sets up this suggested dichotomy between sectarian and nonsectarian schools, and to approve such a distinction here would be to create a program quite different from the one the legislature actually adopted.

413 U.S. at 833-834; *see also Americans United for the Separation of Church & State v. Dunn*, 384 F. Supp. at 722; *Public Funds for Public Schools v. Byrne*, 444 F. Supp. at 1232. In these cases, there was a risk that religion would be promoted because from 63%, *Dunn*, 384 F. Supp. at 717 n.2, to 95%, *Byrne*, 590 F.2d at 1229, of the schools that would receive benefits were religious. Under the AFLA, religious organizations are to be involved in *one hundred percent* of the programs and the undisputed record demonstrates *actual* advancement of religion, not just a risk. *See* Appellees' Br. 9-17.

In *Meek v. Pittenger*, 421 U.S. 349, 371 n.21 (1975), the Court refused to sever the constitutional provisions of one of the statutes at issue, even though the statute contained a severability clause, finding that it was a "minor" part of the Act and noting that the state would not necessarily have passed the law solely to provide the aid found not to be offensive. *See also Rhode Island Fed'n of Teachers v. Norberg*, 479 F. Supp. 1364, 1373-74 (D.R.I. 1979), *aff'd*, 630 F.2d 855 (1st Cir. 1980).

This Court has refused to sever statutes found violative of the Establishment Clause even where it found that the statute had a secular purpose and was not wholly motivated by religious purposes. Similarly, the pervasive presence of religion in the AFLA renders the "valid secular purpose" of the Act, J.S. App. 22a, irrelevant to the severability analysis.

Tilton v. Richardson, 403 U.S. 672 (1971), one of the only Establishment Clause cases in which the Court chose to sever a statute containing a provision that violated the Establishment Clause, is clearly distinguishable from this case. There the Court held that a federal statute that provided construction grants to universities was constitutional, except for a portion of the statute that limited to twenty years the authority of the government to recover grants that were used for religious purposes.[30] The Court severed the twenty-year limit and wrote:

> We have found nothing in the statute or its objectives intimating that Congress considered the 20-year provision essential to the statutory program as a whole. . . . [T]here is no basis for assuming that the Act would have failed of passage without this provision; nor will its excision impair either the operation or administration of the Act in any significant respect.

Id. at 684. Although Congress did not consider the unconstitutional provision in *Tilton* to be of great significance, Congress clearly viewed the AFLA provisions concerning religious organizations as necessary and essential to the success of AFLA. Furthermore, the statute in *Tilton* contained *explicit* statutory

30 In striking down this provision, the Court held that the possibility that a grantee would use federally financed buildings for religious purposes twenty years hence could have the effect of advancing religion. 403 U.S. at 683.

restrictions on the use of the federal funds and there had been a track record of careful enforcement under the Act:

> The Act itself was carefully drafted to ensure that the federally subsidized facilities would be devoted to the secular and not the religious function of the recipient institutions. It authorizes grants and loans only for academic facilities that will be used for defined secular purposes and expressly prohibits their use for religious instruction, training, or worship. *These restrictions have been enforced in the Act's actual administration* . . . .

Id. at 679-80 (emphasis added). As the district court found, the AFLA has neither assurances nor an established track record:

> . . . the AFLA contains no restriction whatsoever against the teaching of religion *qua* religion or any attempt to use the education and counseling process to "intentionally or inadvertently" inculcate religious belief. . . . This absence of any statutory prohibition on [sic] inculcation of religious belief puts the AFLA in a class by itself. The Court knows of no other statutory scheme that expressly contemplates religious involvement in a government-funded program and does not attempt to segregate inculcation of religious belief from public financial support.

J.S. App. 29a & n.13. As appellees' main brief and the undisputed facts indicate, the AFLA is unprecedented in its "track record" of promoting religion.

This Court has refused to write in necessary prohibitions that are missing from the face of the statute. In *Levitt v. Committee for Pub. Educ. & Religious Liberty*, 413 U.S. 472 (1973), this Court struck down a New York statute providing for reimbursement for certain testing and recordkeeping costs because the statutory restrictions on sectarian use were inadequate. They left the rewriting to the New York State legislature. In *Committee for Pub. Educ. & Religious Liberty v. Regan*, 444 U.S. 646 (1980), the Court upheld new legislation that rectified the 1970 New York statute struck down in *Levitt*. Justice White stressed that if the statute in *Regan* had not contained statutory assurances, the outcome would likely have been different:

> Of course, under the relevant cases the *outcome would likely be different were there no effective means for insuring that the cash reimbursements would cover only secular services*. But here, as we shall see, the New York law provides ample safeguards against excessive or misdirected reimbursement.

Regan, 444 U.S. at 659 (emphasis added; citations omitted).

CONCLUSION

This Court should reverse the district court's decision to invent a statute different from the one passed by Congress. Obviously, Congress may properly reach the issue of adolescent pregnancy, but it is the method that Congress chose, and which the district court found clearly unconstitutional, that is at issue in this case. Invalidating the AFLA in its entirety will not, as appellants repeatedly insist, Gov. Br. 17-19, Int. Br. 14-17, open the floodgates for invalidation of federal health, housing or poverty programs through which some religious organizations sometimes receive federal funds. Rather, it will make clear that the government may not promote religion or teach religious values to achieve secular goals, whether in the area of sexuality, homelessness or hunger.

For the foregoing reasons, and for the reasons stated in our opening brief, this Court should affirm the district court's order declaring the Adolescent Family Life Act unconstitutional both on its face and as applied, and reverse the district court's order on severability.

Respectfully submitted,

Bruce J. Ennis, Jr.
Ennis Friedman & Bersoff
1200 17th St., N.W.
Suite 4000
Washington, D.C. 20053
(202) 775-8100

Attorneys for Appellees and Cross Appellants

Janet Benshoof
(Counsel of Record)
Lynn M. Paltrow
Dawn Johnsen
Nan D. Hunter
Rachael N. Pine
American Civil Liberties Union Foundation
132 West 43rd Street
New York, New York 10036
(212) 944-9800

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No. 87-431

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Appellant,

v.

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BRIEF AMICUS CURIAE OF CATHOLIC CHARITIES, U.S.A. AND THE CATHOLIC HEALTH ASSOCIATION OF THE UNITED STATES IN SUPPORT OF THE APPELLANTS

PATRICK FRANCIS GEARY
135 South LaSalle
Suite 3905
Chicago, Illinois 60603
(312) 346-5275

Pandick Technologies, Inc., Chicago • (312) 236-0200

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CONSENT OF THE PARTIES

The parties to this case have consented to the filing of this brief. The original letters of consent have, pursuant to Rule 36.2 of the Rules of Practice of the Supreme Court, been presented to the Clerk of this Court.

IDENTIFICATION AND INTERESTS OF THE AMICI

The *amici* are national associations whose memberships actively deliver social and medical services to the general public on a non-discriminatory basis without regard to race, color or creed. Both of these organizations are comprised of institutions and individuals affiliated with the Roman Catholic Church. Many of the social and medical programs and services delivered by the members of these organizations are funded, at least in part, by federal and/or state monies. Moreover, member organizations of each association provide services under the Adolescent Family Life Act, 42 U.S.C. (Supp. III) 300z *et seq.* (AFLA) which is the subject of the instant case.

Thus, the *amici* represent organizations which have a substantial interest in the Constitutional issues presented by the instant matter. One of the organizations, Catholic Charities, USA, is itself a grantee under the AFLA program and has a direct as well as a representational interest in this case.

A. CATHOLIC CHARITIES, USA

Catholic Charities, U.S.A. (formerly National Conference of Catholic Charities) is a federation of organizations and individuals who carry out the Catholic Church's social welfare activities in the United States. Founded in 1910, Catholic Charities, U.S.A. consists of a nationwide network of 633 agencies and institutions and several hundred thousand volunteers and staff who provide services to, advocate for, and join forces with others to work for a just and peaceful society.

At the local level, Catholic Charities agencies offer

counseling for marital conflict, death, pregnancy, substance abuse, refugee resettlement, and problems related to youth and aging. Agencies also provide supportive assistance such as child care, pregnancy and adoption services, day care, respite care, nutrition and health, and emergency food and shelter.

Most of the Catholic Charities agencies which deliver social services are fully accredited by the Council on Accreditation of Services for Families and Children (COA) which is the largest comprehensive private accreditor of social and mental health services in North America. COA is sponsored by seven major service organizations: Association of Jewish Family and Children's Agencies, Catholic Charities, U.S.A., Child Welfare League of America, Family Service of America, Lutheran Social Service System, National Association for Homes for Children, and National Committee for Adoption.

The various Catholic Charities agencies, in like manner with human service programs of other denominational groups, sponsor programs for the needy and otherwise hurting individuals and families with the assistance of funds from a variety of governmental sources–federal, state, and local[1] Among the major federal programs which are the source of funds for part of the services offered by local Catholic charities and the other religious human services agencies are: the Emergency Food and Shelter Board of the Federal Emergency Management Agency, PL 99-500; the Older Americans Act, 42 U.S.C. 3001 *et seq;* Title XX of the Social Security Act, 42 U.S.C. Sec. 1397; the Job Training and Partnership Act, 29 U.S.C. 1501; Title XIX of the Social Security Act (Medicaid), 42 U.S.C. Sec. 1396i *et seq*; Title XVI of the Social Security Act (Medicare), 42 U.S.C. Sec. 1381 *et seq*; Title IVA and B and E of

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[1] Total income and in-kind contributions to Catholic Charities agencies was $634,859,539 in 1986.

the Social Security Act (Foster Care, Adoption of Hard-to-Place Children, Child Welfare Services), 42 U.S.C. Sec. 603; and other titles of the Social Security Act; the National Housing Act as amended, 12 U.S.C. Sec. 1701 *et seq*, including Sections 8 and 202; Community Development Block Grant, Emergency Shelter, 42 U.S.C. Sec. 5301 *et seq*; Low Income Energy Assistance Program, 42 U.S.C. Sec. 8621; the Refugee Act of 1980, 8 U.S.C. Sec. 1101, 1151-53, 1157-59, 1181-1182, 1253-4, 1521-24; the Immigration Reform and Control Act of 1986, PL-99-603 100 Stat 3359; the Juvenile Justice Act, 42 U.S.C. 5601 *et seq* including its runaway youth and homeless youth title, the Alcohol, Drug Abuse & Mental Health Grant, 21 U.S.C. 1001 et seq., the Child Abuse and Neglect Act, including the domestic violence title, 42 U.S.C. Sec. 5101 *et seq*; the Agricultural Adjustment Act of 1938 as amended, 7 U.S.C. Sec. 1281 *et seq* including the Agricultural and Consumer Protection Act of 1973, 7 U.S.C. Sec. 612c nt. and the Temporary Emergency Food Assistance Program of 1983, 7 U.S.C. Sec. 612c nt.

The most recent statistics show that in 1986, the Catholic Charities agencies throughout the United States provided services to over eight million individuals and to over two million families. These social services included counseling services, pregnancy services, adoption services, refugee resettlement and immigration services, socialization services, food services, emergency/crisis services, support services, housing services, out-of-home care services.

1. Counseling

In 1986, a total of 739,711 persons received counseling services through Catholic Charities agencies in the United States. These services were provided to children, adults, and aging persons. A total of 331,871 families were served during that period. The type of counseling services provided included individual counseling, family counseling, marital counseling, premarital counseling,

adolescent counseling, group counseling, peer counseling, hot line counseling, family abuse and violence counseling, alcohol/drug counseling, employment counseling, grief-loss counseling, pregnancy counseling, post-abortion counseling, counseling for AIDS victims, and family mediation services.

2. Pregnancy Services

Catholic Charities agencies provided pregnancy services for 73,061 individuals and 32,814 families during the year of 1986. These services included pregnancy testing, pre and post-natal care, maternal assistance to pregnant women, housing for pregnant women, and continued education for pregnant and parenting clients.

3. Adoption Services

A total of 44,022 individuals and 18,380 families were the recipients of adoption services through Catholic Charities in 1986. A total of 3,981 adoptions were completed in that year, almost 70% of these being special needs or "waiting" children. Seven hundred and four of these adoptions were international adoptions. The services provided include pre-adoption foster care placement, post-adoption services, infant adoption and services to adult adoptees.

4. Refugee Resettlement/Immigration Services

A total of 242,166 individuals and 90,863 families were the recipients of Catholic Charities Refugee Resettlement/Immigration Services during the year 1986. Among the services under the Refugee Resettlement and Immigration program were pre-reception preparation, unaccompanied minors, family reunification, language education, general education, employment services, health services, housing placement, and legal services.

5. Socialization/Supportive Services

A total of 529,927 individuals and 227,000 families were recipients of Socialization Services during 1986. These services are primarily supportive and include, *inter alia*, Summer Camp for Youth, Summer Camp for the Elderly, Neighborhood Centers, Big Sister and Big Brother Programs, Golden Age and Senior Center programs.

6. Food Services

The Food Service Program served over 3,000,000 individuals and 743,000 families in 1986. These services included soup kitchens, food banks, meals on wheels, and nutritional services.

7. Emergency/Crisis Services

The Catholic Charities served over 2,000,000 individuals and 652,764 families with Emergency/Crisis Services during the year 1968. These services included shelter for homeless adults and families, shelter for abused/neglected adults, shelter for runaway youth, emergency food services, emergency clothing, emergency medication, emergency housing services, emergency financial assistance, services for abused elderly, services for rape victims.

8. Support Services

In 1986, Catholic Charities agencies provided support services to 611,995 individuals and 238,915 families. These services included adult day care, child day care, hospice care, homemaker services, legal services, transportation services, job development, sheltered workshops, housing search, phone reassurance/friendly visits, independent living services, and home health care service.

9. Housing Services

During 1986, Catholic Charities agencies provided housing services to 75,656 individuals and 38,951 families. These services include housing units for the elderly, housing units for families, single room occupancy, and housing

units for the disabled.

10. Out-of-Home Care Services

During the year 1986, a total of 182,535 individuals (148,425 of these were children) and 119,547 families were recipients of Out-of-Home Care Services provided by Catholic Charities agencies. The services provided included those to physically and/or mentally disabled children, delinquent youths, adults who are dependent, neglected, abused, or emotionally disturbed, adults who are physically disabled or mentally disturbed, and finally, aged persons.

B. THE CATHOLIC HEALTH ASSOCIATION OF THE UNITED STATES

The Catholic Health Association of the United States (CHA) is a national service organization of Catholic hospitals and long-term care facilities, their sponsoring organizations and systems, and other health-related agencies and services operated as Catholic.

The Catholic Health Association is comprised of 614 member hospitals and 259 long-term care facilities. These health care facilities are located in each of the 50 states and care for more than 40,000,000 persons annually. These CHA member hospitals have approximately 170,000 beds which amounts to 16% of all the non-Federal short-stay hospital beds in the United States. The acute care hospitals admitted almost 2,000,000 Medicare patients in 1985. Medicaid admissions to such facilities in 1985 amounted to over half a million persons.

ARGUMENT

I.

This is an unique and important case because the decision of the lower court extends the application of *Lemon v. Kurtzman*, 403 U.S. 602 (1971) to sectarian social welfare organizations. This decision prohibits the funding of

a public social purpose where that is fulfilled through the work of non-profit organizations having sectarian affiliation. Heretofore, the impact of *Lemon* and its progeny has been restricted to the delivery of educational services. Unless the lower court's decision is reversed, the delivery of important social services will be jeopardized and curtailment of these services will hurt literally tens of millions of needy persons.

Substantial cause exists to warrant different treatment of sectarian related social welfare organizations in contrast to that which this Court has accorded to sectarian related educational institutions. In the first place, the grantees under the Adolescent Family Life Act, 42 U.S.C. (Supp. III) 300z *et seq.* (AFLA) are required to provide a professionally competent social service. The fact that the work involved deals with a matter of public morality does not convert this service into the teaching of religion. Secondly, there is a long uninterrupted history of cooperation between government and sectarian related institutions in the delivery of social services. This Court has in the past chosen not to utilize the *Lemon* test in dealing with instances of historical practice. See *Marsh v. Chambers*, 463 U.S. 738 (1983); *Walz v. Tax Commissioner*, 397 U.S. 420 (1970). Finally, there is ample legal precedent to support distinction of social services from educational services.

A.

Despite the rhetoric of both the appellees and the court below, this case does not involve the teaching of religion or religious indoctrination. The Adolecent Family Life Act, 42 U.S.C. (Supp. III) 300z *et seq.* (AFLA), provides in pertinent part that government funds will be available for demonstration projects in "prevention services" and/or "care services". The prevention services referred to here are professionally conducted counseling. Counseling, in the context of the delivery of social welfare services, is not

teaching.[2]

Secondly, the object of this counseling is not a religious tenet, or a doctrine peculiar to a religious sect or denomination. Rather, the focus of this program is clearly a matter of public concern and public morality. This fact is conceded by the court below. *Bowen v. Kendrick* 657 F. Supp. 1547, 1558 (D.D.C. 1987).

It is well settled as a matter of constitutional principle that the government may act to further a value judgment of public morality. *Maher v. Roe*, 432 U.S. 464, 474 (1977). Moreover, it is also well settled that a statute does not violate the Establishment Clause merely "because it happens to coincide or harmonize with the tenets of some or all religions." *McGowan v. Maryland*, 366 U.S. 420, 442 (1961).

For example, in *Harris v. McRae*, 448 U.S. 297, 314 (1980), the Supreme Court stated, "That the Judaeo-Christian religions oppose stealing does not mean that a state or the federal government may not, consistent with the Establishment Clause, enact laws prohibiting larceny." *Id.* at 319. Likewise, the fact that the legislative purpose of the AFLA, which seeks to discourage adolescent premarital sexual activity, coincides with the traditional Judaeo/Christian view does not mean that the statute seeks to advance religion or that grantees under the program seek to "teach religion". 448 U.S. 297, 319 (1980).

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[2] "Counseling involves helping individuals or groups resolve social and personal problems through the process of developing a relationship, exploring the problem in depth and by exploring alternative solutions." Zastro, Charles *The Practice of Social Work*, (Dorsey Press, Homewood, Illinois, 1981) p. 13. *See also*, Rogers, Carl R., *On Becoming a Person*, (Houghton Mifflin Company, Boston, 1961,) pp. 276, 288. Biesteck, Felix, *The Case Work Relationship*, (Loyola Univ. Press, Chicago, 1957) pp. 100-119.

Advancement of public morality does not automatically become the "teaching of religion" simply because a sectarian related institution undertakes to carry out the program activity. Morality may indeed be a concern of organized religion, but the two are not identical. Moral belief and conduct can and, indeed, do exist independently of organized religion.

B.

The AFLA must be seen as an element of a larger mosaic created by the cooperation of the government and sectarian and other private institutions in the delivery of social services. Any judgment of the constitutionality of the AFLA must be made in the context of a long history.

The cooperative effort of government and organized religion in the delivery of social services is both long standing and complex. As noted above,[3] there are numerous federal statues and programs which presently utilize institutions with sectarian affiliation as instrumentalities in the delivery of social services. This relationship is not new; it dates to the early years of the Republic. Many of the early efforts to meet the needs of widows, orphans, and paupers were undertaken by sectarian institutions, especially in the urban areas. Because of the importance of these efforts to the local communities, such insitutions were the recipients of public funds. In New York State, for example, government assistance for the care of orphans and needy children by sectarian related institutions began as early as 1855.

> Beginning with 1855, the state began to appropriate a general grant of money in aid of private orphan asylums to be distributed through county officials among the various institutions on per capita basis. Chapter 538 of the laws of 1855 appropriated $35,000 to be distributed among the

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[3] See pp. 3-4 above.

> 'incorporated orphan asylums of the state'. The same amount was appropriated in 1856 and 1857.

Schneider and Deutsch, *History of Public Welfare in New York State 1867-1940*, (Univ. of Chicago Press, Chicago, 1941) pp. 338-339 (1941).[4]

The New York Catholic Protectory, which was established in 1863, and which became the largest single child care institution in the United States, was also the recipient of public assistance.[5] In 1875, the state granted per capita subsidies for the care of children who would otherwise be public charges.[6]

The Sisters of St. Joseph founded the Lecouteux, St. Mary's Institution for Deaf Mutes in 1859, at Buffalo, New York. After a period of struggle, the institution, a pioneer in efforts to improve the care and development of deaf mutes, became successful. As noted by Schneider and Deutsch, *History of Public Welfare, New York State, 1867 to 1940*, (Univ. of Chicago Press, 1941) at p. 371:

> In 1865, [the Institution] received $500 from the state in lump sum. State grants were made regularly for several years thereafter. The legislative enactments of 1871 and 1872 authorized (the Institution) to admit deaf mutes at the expense of town, county, or the state on the same basis operated with respect to the New York Institute.[7]

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[4] *See also, New York Laws of 1863*, Ch. 210; *New York Laws of 1864*, Ch. 401; *New York Laws of 1865*, Ch. 641; *New York Laws of 1866*, Ch. 774.

[5] *New York Laws of 1866*, Ch. 647; *New York Laws of 1864*, Ch. 401, 405; *New York Laws of 1871*, Ch. 83.

[6] Chancey, Alexander, "History of Social Work and Social Welfare-Significant Dates" (*Encyclopedia of Social Work*, 18th Ed., Vol. 1).

[7] *New York Laws of 1865*, Ch. 641; *New York Laws of 1856*, Ch. 774; *New York Laws of 1871*, Ch. 548; *New York Laws of 1872*, Ch. 670.

New York City, as well as the State of New York, made contributions to sectarian social welfare organizations throughout the 19th century. "At one time or other, almcst all private charities in New York City received some state or municipal patrɔnage." Mohl, Raymond, *Poverty in New York 1727-1825*, (Oxford Univ. Press, New York, 1971) at p. 151.

Cooperation between government and organized religion and the delivery of social services was not limited to New York. St. Mary's Industrial School for Boys, in Baltimore, Maryland, was partially funded by the State of Maryland and the city of Baltimore from 1869 to 1950.[8]

The State of Illinois also utilized services of sectarian institutions in carrying out social services. The Illinois Law of 1869, for example at p. 309, made appropriations for institutions sponsored by religious organizations.

The federal government also has a history of aiding the accomplishment of a public purpose where the effort is conducted under the auspices of religious organization. In 1897, Congress appropriated monies to assist in the construction of facilities at Providence Hospital, which was under the care of an Order of Roman Catholic Sisters, 29 Stat. 655, 679.

Adjudication of the Establishment Clause has established the principle that historical practice is an important element in constitutional analysis, "the court properly looked to history in upholding legislative prayer." *Marsh v. Chambers*, 463 U.S. 783 (1983); property tax exemptions for houses of worship, *Walz v. Tax Commissioner*, 397 U.S. 664 (1970); and Sunday closing laws. *McGowan v. Maryland*, 366 U.S. 420 (1961). As Justice Holmes once observed "(I)f a thing has been practiced for

[8] See Trustees reports to the governor and legislature for the State of Maryland and to the City Council of Baltimore.

200 years by common consent, it will need a strong case for the Fourteenth Amendment to affect it." *Jackman v. Rosenbaum Co.*, 260 U.S. 22, 31 (1922). *Wallace v. Jaffree*, 472 U.S. 38,80 (1985) (opinion of O'Connor, J. concurring in judgment). If, indeed, "a page of history is worth a volume of logic", *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921), then it is clear that the delivery of social welfare services by sectarian agencies does not violate the Establishment Clause of the First Amendment.

C.

The history of the relationship between government and sectarian institutions in the delivery of social welfare services not only evidences a long standing practice, but also suggests the existence of a legally significant difference between aid for such services and aid for education. For a period of almost a hundred years, the courts, legislatures and constitutional conventions have treated education as distinct from social services.

For example, the New York State Constitutional Convention of 1894 adopted a provision which prohibited appropriation of state money for sectarian educational institutions. Art. IX, Section 4, N.Y. Constitution of 1894. However, during that convention, extensive debate ranged over the question of whether a similar restriction should also be placed on sectarian charitable institutions. The result of this debate was the adoption of a separate section to the New York State Constitution which permitted state money to be paid to sectarian institutions engaged in certain social services.[9] Art. VIII, Section 14. Lincoln, Charles Z., *Constitutional History of New York* (*Lawyers*

[9] Article VIII, Section 14, was omitted from the New York Constitution of 1938 and and is not in the present constitution. The distinction between educational services and social services was, however, recognized in *Sargent v. Board of Education*, 177 N.Y. 317,69 N.E. 772 (1904).

Co-op., (1906) Vol. III, pp. 454-472, 560-579.

The Illinois State Supreme Court, which adopted the view that the provisions of its state constitution track the Establishment Clause rulings of the Federal Constitution, ruled that payments to sectarian social service agencies do not violate constitutional prohibitions. *Dunn v. Chicago Industrial School for Girls*, 280 Ill. Rptr. 614-619 (1917). *See also St. Hedwig's School v. Cook County*, 289 Ill. 432 (1919); *Trost v. Ketteler Manual Training School*, 282 Ill. 504 (1918).

The United States Supreme Court was faced with this distinction in a case arising out of the congressional support provided to Providence Hospital. In *Bradfield v. Roberts*, 175 U.S. 291 (1899), the complaint asserted that Providence Hospital was conducted under the auspices of the Sisters of Charity of Emmitsburg, Maryland, and that the Congress had no power to make the appropriation because it would be making a "law in favor of religious establishment." *Bradfield v. Roberts, supra*, at *297*

The Court held that the fact that the hospital was operated under the auspices of the church was wholly immaterial and did not serve to make a religious corporation out of a purely secular one.

> Nor is it material that the hospital may be conducted under the auspices of the Roman Catholic Church. To be conducted under the auspices is to be conducted under the influence or patronage of that church. The meaning of the allegation is that the church exercises great and perhaps controlling influence over the management of the hospital. It must however be managed, pursuant to the law of its being. That the influence of any particular church may be powerful over the members of a non-sectarian and secular corporation, incorporated for a certain defined purpose and with clearly stated powers, is surely not sufficient to convert such a corporation into a religious or sectarian body. That fact does not alter the legal character of the corporation. *Bradfield v. Roberts*, 175 U.S. 291, 298 (1899).

Further, it must be noted that the distinction between educational and social service agencies is evident today in many of the state constitutions throughout the country. The recognition of these distinctions manifests good and sufficient cause that the *Lemon* test not be applied with respect to sectarian related social service organizations.[10]

II.

The effort to establish and maintain the *Everson* "wall of separation" has been fraught with overwhelming difficulty. Chief Justice Rehnquist recently noted that the Establishment Clause decisions "have with embarrassing candor conceded that the 'wall of separation' is merely a 'blurred, indistinct, and variable barrier' which 'is not wholly accurate' and can only be 'dimly perceived'." *Wallace v. Jaffree*, 472 U.S. 38,107 (1985) quoting *Lemon v. Kurtzman*, 403 U.S. 602, 614 (1971); *Tilton v. Richardson*, 403 U.S. 672, 677-78 (1971); *Wolman v. Walter*, 433 U.S. 229, 236 (1977); *Lynch v. Donnelly*, 465 U.S. 668 (1984).

At the present time, two members of the Court have

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[10] The Florida Constitution under Art. 1, Section 3, states "No revenue of the state or any political subdivision or agency thereof shall ever be taken from the public treasury directly or indirectly in aid of any church, sect or religious denomination or in aid of any sectarian institution". The State Supreme Court has recognized that this section does not prohibit the state from promoting the general welfare, *Nohrr v. Brevard County Education Facilities Authority* 247 So. 2nd (1971).

The Virginia Constitution prohibits aid to sectarian institutions under Art. 4, Section 16, but the same section permits counties or cities to make contracts with any institution dealing with special welfare. Virginia Statute 15.1-24 provides in pertinent part that this section "shall not be construed to prohibit any counties or cities from making contracts with any sectarian institution for the care of indigent, sick, or injured persons".

openly rejected the *Lemon* test. In one instance, *Lemon* was never accepted (*Lemon v. Kurtzman*, 403 U.S. 602, 664, White dissent), and in the other instance, the *Lemon* test was rejected as an improper reading of the Establishment Clause. *Wallace v. Jaffree*, 472 U.S. 38,91 *et seq.* (1985) (Rehnquist dissent).

A third Justice has found that the *Lemon* test has proven "problematic" and has suggested that "the standards announced in *Lemon* should be "reexamined and refined in order to make them more useful in achieving the underlying purpose of the First Amendment." *Wallace v. Jaffree*, *supra* p. 68 (opinion of O'Connor, J. concurring in judgment).

Given the history of plurality opinions and five-to-four decisions in cases involving the application of the Establishment Clause,[11] the views of these three Justices signal the need for fundamental revision of the Court's reading of the Establishment Clause. It is the view of the *amici* here that the Court should abandon both the *Lemon* test and the "wall of separation" doctrine set forth in *Everson v. Board of Education* because both precedents are deeply flawed.

Before this Court widens the impact of *Everson* and its progeny to include the delivery of social services, it would seem advisable to closely re-examine the predicates of those holdings. The *Everson* court grounded its opinion on the principle that "the First Amendment has erected a wall between church and state" and "that wall must be

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[11] The following were decided by plurality: *Tilton v. Richardson*, 403 U.S. 677 (1971); *Meek v. Pittenger*, 421 U.S. 349 (1975); *Roemer v. Board of Public Works of Maryland*, 426 U.S. 736 (1976); *Wolman v. Walter*, 433 U.S. 229 (1977).

A majority of 5-4 decided the following cases: *Committee of Public Education v. Regan*, 444 U.S. 646 (1980); *Larson v. Valente*, 456 U.S. 228 (1982); *Mueller v. Allen*, 463 U.S. 388 (1983); *Lynch v. Donnelly*, 465 U.S. 668 (1984).

kept high and impregnable". *Everson v. Board of Education*, 330 U.S. 1, 16 (1947). The Court deduced certain axioms from this principle. The most pertinent of those with respect to the instant case is the injunction that "no tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called or whatever form they may adopt to teach or practice religion." *Everson v. Board of Education*, *supra*, 16.

Jefferson's metaphor of the "wall of separation between church and state" is clearly hyperbole and cannot be taken seriously. As Justice O'Connor recently noted:

> "(C)hurch and state must necessarily operate within the same community. Because of this coexistence, it is inevitable that the secular interests of government and the religious interests of various sects and their adherents will frequently intersect, conflict, and combine. A statute that ostensibly promotes a secular interest often has an incidental or even primary effect of helping or hindering a sectarian belief. *Chaos would ensue if every such statute were invalid under the Establishment Clause. Wallace v. Jaffree*, 472 U.S. 38,70 (1985) (emphasis supplied.)

The Court recognized in *Lemon v. Kurtzman*, 403 U.S. 602, 614 (1971) that "total separation is not possible in an absolute sense" [and] "some relationship between government and religious organizations is inevitable." Organized religion has institutional interaction with government because "(n)o significant segment of our society and no institution within it can exist in a vacuum or in total or absolute isolation from all the other parts, much less from government." *Lynch v. Donnelly*, 465 U.S. 668,673 (1984), citing *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756, 760 (1973). Moreover, this Court has repeatedly held that the Constitution does not require complete separation of church and state, "It [the Constitution] affirmatively mandates accommoda-

tion, not merely toleration, of all religions, and forbids hostility towards any." *Lynch v. Donnelly, supra*, p.674 citing *Zorach v. Clausen*, 343 U.S. 306, 314, 315 (1952); *McCollum v. Board of Education*, 333 U.S. 203, 211 (1948).

Thus, on an institutional level, this Court has never accepted "the wall of separation" as a reality despite the rhetorical references which have appeared in the dicta of Establishment Clause decisions over the years. In truth, the question has never been one of separation, but rather, how to manage the interaction between organized religion and government.

The *Everson* doctrine of separation has another dimension which is seldom mentioned despite its significance. This is the impact of the separation doctrine on the religious experience of the individual citizen. This factor is particularly important in the instant case since much of the lower court's decision is predicated upon the fact that the providers engaged in the delivery of the social services at issue here are committed to ethical principles and conduct. *Bowen v. Kendrick* 657 F. Supp. 1547, 1563-66 (D.D.C., 1987).

The decisions in both *Everson* and *Lemon* are grounded on the notion that it is possible to segregate the various activities of life into abstract but clearly separate categories. This fallacy is not uncommon. We often speak of a political life, an economic life, an emotional life, a sex life, as if these are disembodied realities. In truth, there is no such thing as an isolated political life, economic life, or sex life. There is only one life. All of these are human activities which function and operate coincidentally.

A legal system which attempts to insist that these elements exist apart from one another is doomed to hopeless confusion. Law exists in the space between persons and has no existence apart from human life.

The experience of religion is one of the fundamental and universal realities of human existence. Every human

being regardless of culture, race, or time has had to or will confront the fundamental questions of the meaning of life. Regardless of the reaction, all confront the question.

Neither "government" nor "religion" has an independent existence. Both exist only as activities of human persons. We cannot separate religion from government because we cannot slice up the human persona. Religion goes forward at the same time and through the same bodies and persons that carry on the economic and political life of the country.

The doctrine of "symbolic link" which first appeared in *Grand Rapids v. Ball*, 473 U.S. 373 (1985), and the concept of endorsement put forth by Justice O'Connor in *Lynch v. Donnelly*, 465 U.S. 668,690 (1984), are attempts to fashion a constitutional theory of adjudication which requires religious experience to be "factored out" of human activity.

The net result of such an approach is not only to isolate and segregate the religious experience but also to isolate and segregate those in our society who profess publicly to a religious or ethical conduct. *Everson* and *Lemon* ultimately lead down a slippery slope to judicially imposed hostility towards religion and its practitioners. Ironically, the same effect, when imposed by the legislative or executive branches of government has been held to violate the Free Exercise guarantees of the First Amendment, *McDaniel v. Paty*, 435 U.S. 618 (1978); *Sherbert v. Verner*, 374 U.S. 398 (1963); *Speiser v. Randall* 357 U.S. 513 (1958).

Examination of the lower court decision in the instant case manifests the effects of *Everson* and *Lemon*. All parties to the present action, including the court below, concede that the AFLA has a legitimate secular purpose. All grantees under the statute, including sectarian related organizations, are performing a recognized service of public benefit. Nevertheless, the court below repeatedly makes reference to the fact that the various sectarian related

organizations which received grants under the AFLA manifested the intent to act according to princ'ples and to conduct themselves in keeping with their ethical standards. *Bowen v. Kendrick, supra,* 1563-66. At bottom, the gravamen of the complaint and the lynchpin of the decision of the court below are that the subjective motivation of the providers of this service renders the otherwise acceptable service constitutionally invalid.

It is well-established through long precedent that the First Amendment is intended to regulate conduct rather than belief *Reynolds v. U.S.* 981 U.S. 145 (1879); *Cantwell v. Connecticut* 310 U.S. 296 (1940); yet, in this instance, it is not conduct that the plaintiffs object to, it is the motivation for the conduct that causes concern.

Through the AFLA, government seeks to use sectarian related groups to counsel adolescents regarding premarital sex. The providers do indeed provide such counseling, which all parties agree is a legitimately secular activity. But the court below and the appellees here have made subjective feelings, emotions, and motivations into Constitutional significance. This approach is primitive and unsophisticated. All human activity is fraught with layers of judgments, senses, motivations, which in some cases are in conflict with each other.

The motivation of the *amici* in providing the social and medical services noted above[12] is rooted in the Gospel injunctions and the commitment to the dignity of the human person. Identical motivations and commitments to ethical standards are also present in programs such as those funded by the Alcohol, Drug Abuse & Mental Health Grant, 21 U.S.C. Sec. 1001 *et seq.* or the Child Abuse and Neglect Act, 42 U.S.C. Sec. 5101 *et seq.* or Emergency Shelter under the Community Development Block Grant, 42

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[12] See pp. 3-4.

U.S.C. Sec 5301 *et seq.* The decision of the court below would render all of these services Constitutionally infirm primarily because of the motivation of the providers.

The innuendo at work in both the complaint and in the decision of the court below is that sectarian grantees do things with the program funds other than provide the services required under the contract. Much is made of the "potential" for abuse. This "potential" is coupled with the entanglement theory of present Establishment Clause jurisprudence. "The courts have required aid to parochial schools to be closely watched lest money be put to sectarian use, yet this close supervision will create an entanglement." *Wallace v. Jaffree,* 472 U.S. 38,109 (1985) (Dissent of Justice Rehnquist citing *Roemer v. Board of Public Works of Maryland,* 426 U.S. 736, 768-769 (1976) (White, J. concurring in judgment).

There are several flaws in this reasoning. First, if the entanglement doctrine has any relevance to the First Amendment Religion Clauses at all, it makes more sense as a Free Exercise doctrine rather than a part of Establishment adjudication. It seems clear that sectarian institutions do, indeed, have First Amendment protection against intrusive government action, but "interference with religion should . . . be dealt with under the Free Exercise Clause". *Wallace v. Jaffree,* 472 U.S. 38,109 (1985) (dissent of Justice Rehnquist). This is because sectarian institutions are themselves the proper parties to determine whether government action is intrusive upon their institutional integrity. It is not necessary for the Court to protect churches from themselves. This is particularly true with respect to secular activies undertaken by sectarian related institutions.

Where a sectarian institution determines to accept government funding and to participate in a government program, it makes sense that the institution has also made the judgment that it must submit to supervision

of the discharge of the duties entrusted to it. These *amici* do not apprehend any limitation of their Free Exercise rights in being held accountable for the expenditures of government funds. Abuses of public trust by sectarian institutions should be policed in the same manner as any other institution which accepts government money.[13] Unfortunately, this common sense approach is foreclosed solely because of the *Lemon* doctrine.

The difficulty with the present state of Establishment Clause jurisprudence lies in the fact that the various tests adopted under *Everson* and *Lemon* are driven by vague and subjective criteria. The "patchwork quilt" of Establishment Clause decisions is not the product of a logical or coherent doctrine, but, rather, a manifestation of the absence of any principled method of adjudication. These are "decisions" looking for a principle. Subjective feelings are not an adequate basis for constitutional decision-making.

The notion that Establishment Clause values can be best served by a test of symbolic link or by an assessment of whether there has been an endorsement of religion involves the same subjective elements that have heretofore crippled Establishment Clause jurisprudence. Symbolic to whom and symbolic of what? In whose head does the symbolic link have to occur to create a constitutional violation?

Everson and *Lemon* do not provide the means necessary to serve the values of Establishment Clause of First Amendment. We submit that the question is not, as set forth in *Everson*, how to keep government and religion separate; rather, the question is how to ensure that the

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[13] The contract signed by Catholic Charities U.S.A. as a grantee under the AFLA provides under item 7 of the Terms and Conditions, "The grantee will not teach or promote religion in the AFL Title XX program. The program shall be designed so as to be, to the extent possible, accessible to the public generally."

inevitable interaction between the political life and the religious life of the people of the United States can be made positive for the commonweal.

It is the view of these *amici* that the proper framework for Establishment Clause analysis was set forth by Justice White in his dissent in *Lemon*. *Lemon v. Kurtzman*, 403 U.S. 602, 664 (1971).

> It is enough for me that the States and the Federal Government are financing a separable, secular function of overriding importance in order to sustain the legislation here challenged.

Proper Establishment Clause adjudication can be accomplished by resolution of the question of whether or not there is a legitimate public purpose in the contested government action. It is our belief that any concept of endorsement is in fact subsumed under the public purpose doctrine. If, indeed, there is a public purpose to be achieved by the action of government then, by definition, there cannot be an unlawful endorsement of religion. Such analysis provides a clear and objective focus for adjudication and does not rely upon subjective elements for its application.

CONCLUSION

We urge the court to turn away from the *Everson* and *Lemon* doctrines. Judicial reaction to symbolism, feelings about endorsement, potential for abuse, and entanglement are ultimately not grounded in reason. It is possible, with reason, to understand whether a particular government program has a public purpose. We can see, for example, that shelter for the homeless, and food for the elderly are a public good. Reason also tells us that the public would benefit from counsel to minors to avoid premarital sexual relations. These realities, are the proper footing for Establishment Clause adjudication.

Respectfully submitted,

PATRICK FRANCIS GEARY
135 South LaSalle
Suite 3905
Chicago, Illinois 60603
(312) 346-5275

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Nos. 87-253 and 87-431

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES,

Appellant,

v.

CHAN KENDRICK, *et al.*,

Appellees.

On Appeal from the United States District Court for the District of Columbia

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BRIEF OF THE UNITED STATES CATHOLIC CONFERENCE AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT

MARK E. CHOPKO *
General Counsel

PHILLIP H. HARRIS
Solicitor

Of Counsel:
HELEN M. ALVARÉ

UNITED STATES CATHOLIC CONFERENCE
1312 Massachusetts Ave., N.W.
Washington, D.C. 20005
(202) 659-6690

* Counsel of Record

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

Nos. 87-253 and 87-431

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES,
Appellant,

v.

CHAN KENDRICK, *et al.*,
Appellees.

On Appeal from the United States District Court for the District of Columbia

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BRIEF OF THE UNITED STATES CATHOLIC CONFERENCE AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT

INTEREST OF *AMICUS*

The United States Catholic Conference ("Conference") is a nonprofit corporation organized under the laws of the District of Columbia. All active Catholic Bishops in the United States are members of the Conference. The Conference advocates and promotes the pastoral teachings of the Bishops in such diverse areas as education, family life, health care, social welfare, immigration, civil rights, the economy, communications and housing. When permitted by court rules and practice, the Conference files briefs as *amicus curiae* in litigation of importance to the

Catholic Church and its people throughout the United States. Litigation implicating the Religion Clauses of the first amendment to the Constitution is of particular concern.

In accord with its longstanding interest in the proper interpretation of the Religion Clauses, the Conference participated in this case before the district court as *amicus curiae*. In that court, the Conference stressed the importance of applying the first amendment consistent with its generative history. The district court ruled that a federal statute designed to allow religious organizations to participate on an equal basis with other nonprofit, charitable, and community groups in a program created to alleviate the national problems of teenage pregnancies and adolescent premarital sex is unconstitutional under the Establishment Clause.

The district court's opinion is not only inconsistent with the historical purposes of the Establishment Clause, but it discriminates against religious organizations solely on the basis of their religious character even where the organizations are engaged in charitable activities furthering concededly important social goals. The Conference is concerned that, unless reversed, the district court's flawed Establishment Clause analysis will further derogate the meaning and interpretation of the Religion Clauses and lead to antagonism rather than accommodation between government and religion.

Through their counsel, the parties have consented to the appearance of this *amicus*.

SUMMARY OF ARGUMENT

By its enactment of the Adolescent Family Life Act, 42 U.S.C. §§ 300z to 300z-10 (1982) ("AFLA"), Congress recognized that problems of national significance—adolescent sexual activity and pregnancy—require strong and effective solutions. Congress chose one of many possible approaches to the problem—the involvement of parents in the lives of their children supported by the available resources of the community, including religious and charitable groups as appropriate. Integrating these private and public organizations into such a social welfare program does not even remotely approach government sponsorship or financing of religion. By promoting self-discipline and other prudent approaches to the matter of adolescent sexuality, and by encouraging adoption as an alternative to abortion for adolescent pregnancy (42 U.S.C. § 300z(d)), Congress has taken a course that is "as much a reflection of 'traditionalist' values . . . as it is an embodiment of the views of any particular religion." *Harris v. McRae*, 448 U.S. 297, 319 (1980).

When the district court condemned the inclusion of religiously affiliated organizations in the mix of government and private groups permitted to participate in AFLA grants, it misconstrued the true purpose of the Establishment Clause as illuminated by history and experienced in practice. History teaches that by prohibiting the Congress from enacting laws "respecting an establishment of religion," the Framers of the first amendment [1] intended to bar the new federal government from interfering in matters of religious belief, practice, or governance, yet preserve to the states some measure of freedom to deal with churches in matters promoting the common good. Total separation of church and state was never required, is not desirable, and would be quite impossible to achieve. *Comm. for Pub. Educ. and Religious Liberty v. Nyquist*, 413 U.S. 756, 760 (1973). Given these realities, this Court has stressed that a declaration of unconstitutionality should occur only when, by realistic measure, the state is clearly and directly sponsoring or financing religious activity. *See, e.g., Lynch v. Donnelly*, 465 U.S. 668, 678 (1984).

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[1] The Religion Clauses of the first amendment to the Constitution read: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; . . ."

By relying solely on a strict separation of church and state, the district court ignored this Court's mandate that government must direct its actions toward a "benevolent neutrality" as it concerns religion. *Walz v. Tax Commission*, 397 U.S. 664, 670 (1970). Instead the lower court's "scrupulous neutrality" would require discrimination against any or *all* religions equally. Thus did the court lapse into that hostility toward religion that is itself a threat to religious liberty. *See Engel v. Vitale*, 370 U.S. 421, 442 (1962).

By contrast, the AFLA exemplifies benevolent neutrality in that Congress merely recognized that religious groups, like other community and charitable groups, can contribute to the resolution of the national problem of adolescent pregnancy. On its face the AFLA is religiously neutral; that the policy it embodies may coincide with the views of particular religions does not remotely approach the threshold of religious activity that would implicate the Establishment Clause. *See Harris v. McRae*, 448 U.S. at 319-20. The judgment of the lower court, barring all religious organizations from participation in the AFLA, must be reversed.

ARGUMENT

Since the early days of the Republic, this Court, with due regard to the principles of federalism, separation of powers, and judicial restraint, has declared that acts of Congress will be accorded every presumption in their favor when attacked as being in conflict with the requirements of the Constitution. *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 128 (1810); *Butler v. Pennsylvania*, 51 U.S. (10 How.) 402, 415 (1850). This deference to the considered judgments of Congress is due in part to the fact that "Congress is a co-equal branch of government whose Members take the same oath [judges] do to uphold the Constitution of the United States." *Rostker v. Goldberg*, 453 U.S. 57, 64 (1981). This Court recently reiterated that it is "not willing to assume now that there

exists a significant problem of legislators who perform their legislative duties with indifference to the constitutionality of the statutes they enact." *Illinois v. Krull*, 107 S.Ct. 1160, 1168 n.8 (1987).

Even the district court acknowledged the principle "that a Court must avoid, if possible, finding that a statute does not conform to the requirements of the Constitution." *Kendrick v. Bowen*, 657 F. Supp. 1547, 1552 (D.D.C. 1987). Incredibly, the district court then abandoned the principle entirely claiming that it is "at odds with Establishment Clause case law." 657 F. Supp. at 1552. This would be a surprising turnaround under any circumstances, but it is particularly unsupportable here where Congress specifically considered the constitutionality of the Adolescent Family Life Act, 42 U.S.C. §§ 300z to 300z-10 (1982) *during the pendency of this litigation*, and concluded that the inclusion of religious groups among permissible grantees is constitutional. S. Rep. No. 98-496, 98th Cong., 2d Sess. 9-10 (1984). This finding, which should have been given great weight (*Rostker v. Goldberg*, 453 U.S. at 64), was ignored by the lower court. Having thus started off in the wrong direction, the court inevitably came to incorrect conclusions regarding the constitutionality of the participation of religiously affiliated groups in the AFLA.[2]

I

BENEVOLENT NEUTRALITY, NOT SEPARATISM, MUST BE AT THE HEART OF ESTABLISHMENT CLAUSE ANALYSIS.

In their original memorandum before the district court, plaintiffs argued "that two of the central principles be-

[2] On August 13, 1987, the district court upheld the remainder of the AFLA, after severing the participation of religious organizations. Plaintiffs below have cross-appealed that ruling (No. 87-462). The Conference's participation as *amicus curiae* in Nos. 87-253 and 87-431 is limited to the district court's ruling that the AFLA is unconstitutional on its face under the Establishment Clause.

hind the Establishment Clause are those of 'separatism' and 'neutrality'."[3] Plaintiffs conceded that "[t]he principle that benefits must be distributed neutrally without regard to religion was stated in *Everson v. Bd. of Educ.* [330 U.S. 1, 16 (1947)]" citing *Walz v. Tax Comm'n*, 397 U.S. 664 (1970).[4] Perhaps recognizing that this concession would support the AFLA's method for distributing grants to a variety of volunteer and community organizations, plaintiffs never explained the neutrality envisioned by this Court in *Walz v. Tax Comm'n*, 397 U.S. at 669. Instead, they vigorously pursued "separatism," embracing the "wall of separation between church and State," found in *Reynolds v. United States*, 98 U.S. 145, 164 (1878) and originating in an 1802 letter by Thomas Jefferson to the Danbury Baptist Association.

When the district court wrote its opinion supporting plaintiffs' attack upon the social welfare program established by the AFLA, the "benevolent neutrality" of *Walz* (397 U.S. at 669) had been transformed into "scrupulous neutrality" (657 F. Supp. at 1566), and the "wall of separation" was firmly erected as the sole basis for the Establishment Clause's existence (657 F. Supp. at 1569). As the court's only philosophical and historical basis for interpreting the Establishment Clause, Thomas Jefferson's unfortunate choice of words has led, in this case, to the complete exclusion of numerous charitable, nonprofit organizations from participation in a program for the public benefit simply because those organizations are affiliated with religion. This regrettable result is one that would surely surprise the Framers of the Constitution and the states that originally ratified the Bill of Rights.

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[3] Memorandum in Support of Plaintiffs' Motion for Summary Judgment at 11 (November 19, 1984).

[4] *Id.*

A. History Demonstrates That "Separatism" Was Not A Value Sought To Be Protected By The Establishment Clause.

Despite this Court's regular insistence that the history of the first amendment aid interpretation of the Religion Clauses,[5] the district court's sole historical underpinning to its lengthy opinion is contained in one brief reference to Thomas Jefferson's "wall of separation" between church and state. 657 F. Supp. at 1569. Whatever efficacy Jefferson's statement had in Establishment Clause analysis, it was thoroughly discredited by Chief Justice Rehnquist's scholarly dissertation on the history of the first amendment in *Wallace v. Jaffree*, 472 U.S. 38, 91-114 (1985) (Rehnquist, J., dissenting). As there explained, the wall has become a "blurred, indistinct, and variable barrier" which "is not wholly accurate" and can only be "dimly perceived." 472 U.S. at 112.[6] "The concept of a 'wall' of separation is a useful figure of speech . . . [b]ut the metaphor itself is not a wholly accurate description of the practical aspects of the relationship that in fact exists between church and state." *Lynch v. Donnelly*, 465 U.S. at 673. History is much more illuminating.

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[5] *E.g., Edwards v. Aguillard*, 107 S.Ct. 2573, 2589-90 (1987) (Powell, J., concurring); *Lynch v. Donnelly*, 465 U.S. 668, 673-76 (1984); *Comm. for Pub. Educ. and Religious Liberty v. Nyquist*, 413 U.S. 756, 770 (1973); *McGowan v. Maryland* 366 U.S. 420, 437-41 (1961).

[6] At best, the wall of separation is little more that a "useful signpost" on the road to legitimate Establishment Clause analysis. *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 123 (1982). But more sign posts, providing additional guidance, are surely needed on a road that "has become 'as winding as the famous serpentine wall' [Jefferson] designed for the University of Virginia." *Nyquist*, 413 U.S. at 761 (quoting *McCollum v. Bd. of Educ.* 333 U.S. 203, 238 (1948) (Jackson, J., concurring). As Justice Douglas, writing for the Court in *Zorach v. Clauson*, stated: "The First Amendment, however, does not say that in every and all respects there shall be a separation of Church and State." 343 U.S. 306, 312 (1952).

The history of the drafting and negotiations that led to the wording of the Religion Clauses as finally adopted by the First Congress is detailed by the Chief Justice in *Wallace v. Jaffree*.[7] The generative process that resulted in the Establishment Clause shows that it had two purposes: first, to prevent Congress from establishing or favoring a *national* religion; second, to prevent Congress from interfering with the *states'* policies with regard to religion.[8] The phrase "respecting an establishment" did not mean merely concerning or touching upon religion. Indeed, Representative Livermore of New Hampshire had proposed such language in the House of Representatives on August 15, 1789, and his proposal was rejected.[9] As the Chief Justice points out:

> None of the other Members of Congress who spoke during the August 15th debate expressed the slightest indication that they thought the language before them from the Select Committee, or the evil to be aimed at, would require the Government to be absolutely neutral as between religion and irreligion.

Wallace v. Jaffree, 472 U.S. at 99. There is nothing in the records of the First Congress to indicate that the use of the word "respecting" was in any way intended to

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[7] 472 U.S. at 92-98. As *amicus curiae*, the Conference reviewed the history of the Establishment Clause in, *e.g.*, *Mueller v. Allen*, 463 U.S. 388 (1983); *Aguilar v. Felton*, 473 U.S. 402 (1985); and *Ohio Civil Rights Comm'n v. Dayton Christian Schools, Inc.*, 477 U.S. 619 (1986).

[8] 1 *Annals of Congress* 730-31 (Gales & Seaton eds. 1789); Corwin, *The Supreme Court As National School Board*, 14 Law and Contemp. Probs. 3, 11 (1949); I A. Stokes, *Church and State in the United States* 539-40 (1950); M. Malbin, *Religion and Politics—The Intention of the Authors of the First Amendment* 16 (1978).

[9] Livermore's terminology was: "Congress shall make no laws touching religion, or infringing the rights of conscience."

alter the meaning of an *established* religion as being a *national* religion.[10]

The language of the Religion Clauses as ratified does not concern itself with religion in general, but with the particular problem of the fear of a national religion. The Framers of the Constitution "had no fear or jealousy of religion itself, nor did they wish to see us an irreligious people . . .; they did not intend to spread over all the public authorities and the whole public action of the nation, the dead and revolting spectacle of an atheistical apathy." S. Rep. No. 376, 32d Cong., 1st Sess. 4 (1853); *see also Zorach v. Clauson*, 343 U.S. at 312. Any doubt on this point was surely dispelled by the early congressional actions accommodating and even directly benefiting religion in general. *Lynch v. Donnelly*, 465 U.S. at 675-78; *Marsh v. Chambers*, 463 U.S. 783, 786-90 (1983); *Wallace v. Jaffree*, 472 U.S. at 99-110. The Clauses were included in the Bill of Rights:

> . . . not as a protection *from* religion, but rather as a protection *for* religion. They were inserted in our Constitution largely because its framers felt that they were important to ensure the continuance and the strengthening of religion, which could not flourish under American conditions if any State Church were either provided for or tolerated.

I A. Stokes, *Church and State in the United States* 556 (1950).

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[10] At the time of the Constitutional Convention, there was a wide diversity of views and practices among the states regarding established religion. *See* III *Debates on the Adoption of the Federal Constitution* 330 (J. Elliot 2d ed. 1836). The Religion Clauses were molded to meet the needs and wishes not only of the people of Virginia, whose proposal was not adopted, but of the varied and sometimes widely divergent views of all the states on the appropriate relation of government to religion. The Virginia model cannot reasonably be presumed to have been the desired prototype of states that for themselves selected very different models of church-state accommodation. Stokes, *supra* note 8, at 444, citing S. Cobb, *The Rise of Religious Liberty in America* 507 (1902).

The Bill of Rights took effect when the Commonwealth of Virginia finally ratified the first ten amendments to the United States Constitution on December 15, 1791. Two years earlier, when the Virginia legislators initially considered the amendments proposed by the First Congress, they postponed ratification and stated their objection to the Religion Clauses:

> The [first] amendment, recommended by Congress, does not prohibit the rights of conscience from being violated or infringed; and although it goes to restrain Congress from passing laws establishing any national religion, they might notwithstanding, levy taxes to any amount, for the support of religion or its preachers; and any particular denomination of Christians might be so favored and supported by the General Government, as to give it a decided advantage over others, and in the process of time, render it as powerful and dangerous as if it was established as the national religion of the country.
>
> This amendment then, when considered as it relates to any of the rights it is pretended to secure, will be found totally inadequate, and betrays an unreasonable, unjustifiable, but a studied departure from the Amendment proposed by Virginia and other states, for the protection of these rights.

Journal of the Senate of the Commonwealth of Virginia, 1785-1790 62-63 (1828). However, no change to the wording of the first amendment occurred between the time of this statement and Virginia's ultimate ratification.

There was no concern expressed during those first congressional debates that the government might enact a law beneficial to religion or religious institutions. 1 *Annals of Congress* 730-31 (Gales & Seaton eds. 1789). "The fact that the founding Fathers believed devotedly that there was a God and that the unalienable rights of man were rooted in Him is clearly evidenced in their writings, from the Mayflower Compact to the Constitution itself."

Edwards v. Aguillard, 107 S.Ct. 2573, 2598 (1987) (quoting *School District of Abington Township v. Schempp*, 374 U.S. 203, 213 (1963)). The amendment reflects the experience of its Framers that officially preferred or nationally established religion generates religious intolerance and infringes upon personal liberty. *E.g., School District of Abington Township v. Schempp*, 374 U.S. at 221-22; *Torcaso v. Watkins*, 367 U.S. 488, 490 (1961). The Establishment Clause was not meant to drive a wedge between church and state, but rather to avoid those relationships between the two which pose a realistic threat of impairing religious liberty. *See Lynch v. Donnelly*, 465 U.S. at 683. The Framers of the Constitution would be surprised, no doubt, to hear a federal court condemning "cooperation between government and religion to further mutually agreeable objectives" and declaring a statute unconstitutional under the first amendment even though the law "emanates from well-founded and benign intentions" and has "a laudable purpose." 657 F. Supp. at 1569.

While also asserting its intention to protect religious freedom, the district court, by excluding religious organizations from participation in the AFLA, has relegated such organizations to a lower status within the nonprofit and charitable community. Quoting *Engel v. Vitale*,[11] the district court, in effect, has done exactly what *Engel* warns against. As applied to the opinion below, the quotation from *Engel* should be made to read:

> When the power, prestige, and financial support of government is placed [against] religious belief, the indirect coercive pressure upon religious [individuals and organizations] to conform to the prevailing officially approved [non]religion is plain.

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[11] "When the power, prestige, and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain." *Engel v. Vitale*, 370 U.S. 421, 431 (1962).

It is equally plain that a society is only truly free when its people and institutions are free from direct or indirect pressure to abandon their own cherished religious beliefs in order to participate in a government program for the benefit of society. *Sherbert v. Verner*, 374 U.S. 398, 404 (1963).

It is essential, therefore, that this Court disavow the lower court's adherence to Jefferson's "wall of separation" in order to protect religion from government coercion and discrimination. As is usually the case when jurisprudential terminology becomes oversimplified, and legal principles become part of the vernacular, the concept of the "separation of church and state" is today more a problem than a precept.[12] The strict separatism advocated by the plaintiffs below, and adopted by the district court, leads to the indefensible view that religious organizations and individuals should be excluded from government participation simply because they are religious. Such a result has no roots in the history of the first amendment.

B. When Neutrality Ceases To Be Benevolent, Suppression Rather Than Accommodation Of Religion Is The Result.

It is imperative to distinguish the "scrupulous neutrality" that can impair the free exercise of religion from the "benevolent neutrality" that is at the heart of this

[12] A practical example of how simplistic thinking about separation can lead to hostility appeared in *The Washington Post*, Dec. 19, 1987, during the pendency of this appeal. Under the headline "Christmas Is Banned in North Pole, Alaska," the Associated Press reported that the principal of the high school in North Pole, Alaska, had banned the use of the word "Christmas." School officials said they were forbidding use of the nine-letter word in order to comply with the separation of church and state. The principal reportedly stated that they were merely trying to make sure one religion or belief was not advocated over another. Certainly, no one could seriously attempt to reconcile the school's regulation with this Court's Establishment Clause jurisprudence.

Court's opinion in *Walz* and recently reaffirmed in *Corporation of the Presiding Bishop v. Amos*, 107 S.Ct. 2862, 2867 (1987). Neutrality does *not* mean suppressing all religions equally. This is the mistake that the district court made when it condemned all AFLA grantees that had any religious affiliation, whether Catholic or Jewish, Lutheran or Buddhist. 657 F. Supp. at 1564-66. Official prejudice against all religions or against only majority faiths is equally reprehensible whether it comes from a district court or from a state employee (*see* note 12, *supra*). Even where such oppression of religion results from measured indifference rather than intentional discrimination, it is at odds with this Court's dictates that religion be allowed to "flourish according to the zeal of its adherents and the appeal of its dogma." *Zorach v. Clauson*, 343 U.S. at 313.

Two fundamental similarities between this case and the *Walz* case should be mentioned before expanding on the principle of benevolent neutrality. The first similarity is that neither this case nor *Walz* involves direct money subsidies to churches. 397 U.S. at 675, 690. *Walz*, of course, involves the exemption of church property from state taxes. This case involves federal grants made available to religious organizations for *secular* purposes.[13] While both may indirectly benefit religion, neither provides government financing for religious activity. AFLA grants are directed to secular activities and the ultimate beneficiaries of the AFLA program are the families that receive counseling and care services from the AFLA grantee.

The other equally important similarity between this case and *Walz* is that the benefit in both cases is made available to a broad class of institutions dedicated to pub-

[13] That religious organizations receiving AFLA grants perform an important role in furthering secular values is not in dispute. This was found by the district court and admitted by the plaintiffs below. 657 F. Supp. at 1559.

lic service. In *Walz*, the tax exemption applied to houses of worship together with hospitals, libraries, art galleries, and other professional, historical and patriotic organizations. 397 U.S. at 671. AFLA grantees likewise include a myriad of community organizations, charitable institutions, voluntary associations, religious organizations and other groups. 42 U.S.C. § 300z-5(a)(21)(B). Therefore, the AFLA can fairly be compared to "[t]he statute that implements New York's constitutional provision for tax exemptions to religious organizations" since both statutes define a class of "entities whose common denominator is their nonprofit pursuit of activities devoted to cultural and moral improvement and the doing of 'good works' by performing certain social services in the community that might otherwise have to be assumed by government." *Walz*, 397 U.S. at 696 (Harlan, J., concurring). On this basis, Justice Harlan found the tax exemption statute to satisfy his standards for neutrality by not excluding from its coverage any group that could reasonably be included within the definition of the goals of the statutory scheme. 397 U.S. at 696. Similarly the AFLA, until the district court excluded religious organizations, met this standard of neutrality.

But simple neutrality alone is not enough, for as former Chief Justice Burger has said:

> The course of constitutional neutrality in this area cannot be an absolutely straight line: rigidity could well defeat the basic purpose of these provisions [the Religion Clauses], which is to insure that no religion be sponsored or favored, none commanded, and none inhibited. The general principle deducible from the First Amendment and all that has been said by the Court is this: that we will not tolerate either governmentally established religion or government interference with religion. Short of these expressly proscribed governmental acts, there is room for play in the joints productive of a *benevolent neutrality* which will permit religious exercise to exist without sponsorship and without interference.

Walz, 397 U.S. at 669-70 (emphasis added). Such neutrality must not be "rigid" or "scrupulous" because, as the Chief Justice added:

> The limits of permissible state accommodation to religion are by no means coextensive with the noninterference mandated by the Free Exercise Clause. To equate the two would be to deny a national heritage with roots in the Revolution itself. (citations omitted).

397 U.S. at 673. The importance of this affirmation of the role that religion plays in our society is highlighted by the concurring opinion of Justice Brennan. *Walz*, 397 U.S. at 687-89.

Justice Brennan's elaboration of the justification for exempting churches from property taxes could well be applied with little modification as the reasons for including religious organizations among the groups eligible for AFLA grants:

> First, these organizations are exempted because they, among a range of other private, nonprofit organizations contribute to the well-being of the community in a variety of nonreligious ways, and thereby bear burdens that would otherwise either have to be met by general taxation, or be left undone, to the detriment of the community.
>
> * * * *
>
> Second, government grants exemptions to religious organizations because they uniquely contribute to the pluralism of American society by their religious activities. Government may properly include religious institutions among the variety of private, nonprofit groups that receive tax exemptions, for each group contributes to the diversity of association, viewpoint, and enterprise essential to a vigorous, pluralistic society.

Walz, 397 U.S. at 688-89. Just as the "very breadth" of the scheme of tax exemptions negated any "suggestion

that the state intends to single out religious organizations for preference," the same breadth and diversity of the groups included in the AFLA scheme negate any suggestion that the federal government intends to favor religious organizations by this important social legislation. *Walz*, 397 U.S. at 689.

Since history shows that separatism was not intended to be the philosophical underpinning of the Establishment Clause, and since in practice both strict separation and rigid neutrality lead to hostility toward religion generally, benevolent neutrality must serve as the baseline for legitimate and balanced Establishment Clause analysis. Measured by that touchstone, the district court's opinion fails.

II

THE AFLA EXPRESSES VALID SOCIAL POLICY AND IS NOT A RELIGIOUS PREFERENCE.

Adolescent sexual activity and pregnancy are social problems of national significance. In its considered judgment, Congress enacted the AFLA to stress self-discipline and abstinence as solutions to the problem of adolescent sexual activity, and to prefer adoption over abortion as a solution to adolescent pregnancy.[14] In the AFLA, Congress recognized that religious organizations, like other community and charitable groups, can contribute to the resolution of these national problems. That some of the religious organizations involved in AFLA grants may agree with congressional judgment about appropriate solutions to the problem is a wholly insufficient reason to declare the AFLA unconstitutional on Establishment Clause grounds. This Court has so held in its opinion in *Harris v. McRae*, 448 U.S. at 319-20.

Issues of adolescent sexual activity and pregnancy are no different in principle from the myriad of other social

[14] The AFLA is not the only appoach Congress has taken to address these and related social problems. *See, e.g.*, 42 U.S.C. §§ 300 to 300a-6a (1982 & Supp. 1987).

welfare issues about which the government and many religious organizations share a common concern. The Conference has addressed controversial and diverse issues of national significance, such as the "fairness doctrine," military expenditures, full employment, fair housing, farm credit, Medicaid funding, minimum wage, plant closings, welfare reform, international banking practices, third-world debt, United Nations funding, and immigration issues, to name a few. The Conference often expresses its views in the context of the legislative process. There could be no reasonable suggestion that every law espousing values which happened to accord with the views of the Conference thereby violates the Establishment Clause. Such a suggestion would be contrary to the intentions of the Framers of the Establishment Clause.[15] Invalidating laws which express common concerns as "establishments of religion" defies logic and does a disservice to the legitimate goals of both government and religion.

A. The Participation Of Religious Organizations In The AFLA Is Constitutionally Permissible Pursuant To *Harris v. McRae*.

Close to the core of the district court's opinion in this case is its suspicion of those religious organizations, participating as grantees under the AFLA, whose religious tenets coincide with the social values expressed in the AFLA. In the words of the court below:

> It is a fundamental tenet of many religions that premarital sex and abortion are wrong, even sinful. (citations omitted). The AFLA does not prohibit these religions from receiving AFLA grants. Thus

[15] Recognizing the inevitability that church and state will have some overlapping interests, at least one member of this Court would narrow the field of controversy to those "statutes and government practices whose purpose and effect go against the grain of religious liberty protected by the First Amendment." *Wallace v. Jaffree*, 472 U.S. at 70 (O'Connor, J., concurring).

> by contemplating provision of aid to organizations affiliated with these religions—aid for the purpose of increasing abstention and adoption—the AFLA contemplates subsidizing the fundamental religious mission of those organizations.

657 F. Supp. at 1563. But this Court has clearly held in *Harris*, 448 U.S. at 319-20, "that the fact that the funding restrictions in [a statute] may coincide with the religious tenets of the Roman Catholic Church does not, without more, contravene the Establishment Clause." Plaintiffs in *Harris* challenged the Hyde Amendment on Establishment Clause grounds claiming that it incorporated into law certain doctrines held by the Roman Catholic Church. The Hyde Amendment severely restricted Medicaid funding for abortions to those necessary to save the life or health of the mother or those arising out of rape or incest under limited circumstances. Although the district court in *Harris* examined the Hyde Amendment pursuant to a *Lemon v. Kurtzman* analysis [16], and found it constitutional, this Court reached the above-quoted holding without employing the *Lemon* analysis or any other test. This was done by deciding, at the threshold, whether a religious preference was at the center of the legislation.

Critical to the holding in *Harris* was this Court's conclusion that the Hyde Amendment expressed "social policy" reflecting Congress' "balancing of competing interests." 448 U.S. at 326. The AFLA is likewise a legitimate expression of social policy. It prefers childbirth to abortion by encouraging adoption, and promotes abstinence and self-discipline as solutions to the problem of adolescent sexual activity. If there is any doubt that

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[16] In *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971), this Court announced three criteria for determining Establishment Clause challenges to the constitutionality of state actions: the statute must have a secular purpose; its principal or primary effect must neither advance nor inhibit religion; it must not foster an excessive government entanglement with religion.

the AFLA is, on its face, legitimate social policy, Congress' statement of its findings is clear. 42 U.S.C. § 300z(a) (1982 & Supp. 1987). It recites the probabilities of familial, medical, social, and economic consequences arising out of the large numbers of adolescent pregnancies occurring in the United States. Moreover, even the district court has acknowledged that "the AFLA has a valid secular purpose . . . . [It] was motivated by Congress' concern that teenage pregnancy and premarital sexual relations are very damaging to society and, particularly, to adolescents (footnote omitted)." 657 F. Supp. at 1558.

Like the Hyde Amendment at issue in *Harris*, the AFLA does no more than promote values—abstinence, and adoption as an abortion alternative—which are coincident with tenets of some religions. By ignoring the teaching of *Harris* and presuming, therefore, the need to apply the *Lemon* test to the AFLA, the district court manifested an analytical error that must now be corrected.

B. This Court Should Apply A Threshold Analysis To Conduct Challenged Under The Establishment Clause To Test For The Possibility Of A Religious Preference.

The reasoning employed in *Harris* was not novel but constituted a specific application of the policy of benevolent neutrality appropriately employed in Establishment Clause analysis. As this Court stated in *Walz*, the boundaries of the Establishment and Free Exercise Clauses of the first amendment are not coextensive. 397 U.S. at 673. Thus, state action which has the effect of benefiting religion more liberally than a scrupulous interpretation of the Free Exercise Clause might is not thereby invalid. There must be something more to result in an

Establishment Clause violation.[17] *Walz*, 397 U.S. at 668. No detailed test need be applied to adjudicate the constitutionality of any statute under the Establishment Clause until there is a threshold determination that, at its core, the state has become impermissibly involved in religious activities. This is especially important where the test applied—the *Lemon* test—is fraught with imprecision and difficulty.[18]

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[17] This approach has been recently articulated in a manner particularly relevant to the facts of the present case:

> In this country, church and state must necessarily operate within the same community. Because of this coexistence, it is inevitable that the secular interest of the government and the religious interests of various sects and their adherents will frequently intersect, conflict and combine. A statute that ostensibly promotes a secular interest often has an incidental *or even a primary effect of helping or hindering a sectarian belief*. Chaos would ensue if every such statute were invalid under the Establishment Clause. For example, the State could not criminalize murder for fear that it would thereby promote the Biblical commandment against killing. The task for the Court is to sort out those statutes and government practices whose purposes and effect go against the grain of religious liberty protected by the First Amendment.

Wallace v. Jaffree, 472 U.S. at 69-70 (O'Connor, J., concurring) (emphasis added).

[18] Beginning in *Lemon* itself, Justice White criticized the "excessive entanglement" prong of the test on the grounds that it creates an "insoluble paradox." 403 U.S. at 668. In her concurrence in *Wallace v. Jaffree*, Justice O'Connor noted that *Lemon's* standards should be "reexamined and refined" to make them more useful in achieving first amendment goals. 472 U.S. at 68-70. Chief Justice Rehnquist in *Wallace v. Jaffree*, 472 U.S. at 108-13, sharply criticized each prong of the *Lemon* test, and highlighted its paradoxical results. 472 U.S. at 110-11. Justice Scalia has most recently been sharp critical of the test in *Edwards v. Aguillard*, 107 S.Ct. at 2593-96.

It is not the purpose of this *amicus* brief to address the inadequacy of the *Lemon* test but rather its unnecessary application to the present case. *But see* briefs *amicus curiae*, *supra* note 7.

An appropriate threshold inquiry to determine whether a particular statute even raises Establishment Clause issues has been suggested by this Court. Beginning in *Walz* and continuing through *Lemon* to the present, this Court has maintained that there are three particular "evils" against which the Establishment Clause was intended to protect: "sponsorship, financial support, and active involvement of the sovereign in religious activity."[19] *Walz*, 397 U.S. at 668; *see also Grand Rapids School Dist. v. Ball*, 473 U.S. 373, 381 (1985). Where a statute does not directly present impermissible government sponsorship of, financial support for, or involvement in religious activity, no detailed application of the *Lemon* test should be undertaken. The heart of the inquiry is the phrase "religious activity."[20] When the activity or conduct under consideration is purely a *social welfare* activity, there is no need for this Court to engage in a detailed process to determine whether the incidental involvement of religious organizations is legitimate.

This concept of a threshold test is borne out by *Harris*. While, in *Harris*, this Court did not state explicitly that it employed the suggested threshold inquiry, the inquiry logically preceded further Establishment Clause analysis. Significantly, the *Harris* Court identified the Hyde Amendment as a "social policy" (448 U.S. at 324-26) and held that the existence of concurrence between

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[19] This precept complements the two purposes of the Clause set forth, *supra* at 8, in I.A.: to prevent Congress from establishing or favoring a national religion, and from interfering with the state's policies regarding religion. The "evils" identified by this Court constitute ways in which government may contravene these purposes.

[20] Definitions of religious activity are best left to each faith's own understandings while "the juridicial definition of religion can remain broad and indeterminate." Esbeck, *Toward a General Theory of Church-State Relations and the First Amendment*, 4 Public Law Forum 325, 348 (1985).

religious beliefs and a state's social policies did not suffice to invalidate the legislation under the Establishment Clause. 448 U.S. at 319-20. In the case at hand, therefore, the district court applied *Lemon* in a situation where it clearly should not have even considered further Establishment Clause analysis. In the AFLA, the government is neither sponsoring nor involving itself in religious activities when it permits contributions of religious organizations to resolve complex social problems. The nature of the administrator does not convert the character of activities from a government program to a religious activity.

Nor does the AFLA implicate financial support for religious activities. Religious organizations are often in the "state's pay" for secular purposes without violation of the Establishment Clause. *Roemer v. Board of Public Works*, 426 U.S. 736, 746 (1976) "It could scarcely be otherwise, or individuals would be discriminated against for their religion, and this Nation would have to abandon its accepted practice of allowing members of religious orders to serve in the Congress and in other public offices." 428 U.S. at 746 n.13. In *Bradfield v. Roberts*, 175 U.S. 291 (1899), this Court upheld the provision of public aid to a corporation consisting entirely of Roman Catholic sisters operating a hospital. Permissible purposes do not become impermissible because they are approved of by one or more religious groups or because religious organizations receive grants limited to those purposes. To conclude otherwise demonstrates hostility toward religion, reflected in the judgment that the coincidence between religion and otherwise acceptable, and even admirable, social goals is unconstitutional.

The AFLA recognizes religious organizations as one among many kinds of social welfare, charitable, and community groups able to deliver services to troubled children and their families concerning adolescent sexual activity and pregnancy. The AFLA does not benefit or

prefer religion by providing financial support, sponsorship, or government involvement with any religious activities. Like the Hyde Amendment at issue in *Harris*, the AFLA expresses valid social policy and is not a religious preference. This Court would add a needed measure of analytical clarity by firmly establishing this principle in reversing the district court.

CONCLUSION

For the foregoing reasons, the judgment of the district court barring participation by religious organizations in the AFLA should be reversed.

MARK E. CHOPKO *
General Counsel

PHILLIP H. HARRIS
Solicitor

Of Counsel:
HELEN M. ALVARÉ

UNITED STATES CATHOLIC CONFERENCE
1312 Massachusetts Ave., N.W.
Washington, D.C. 20005
(202) 659-6690

* Counsel of Record

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Nos. 87-253, 87-431, 87-462

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES

and

UNITED FAMILIES OF AMERICA,
Appellants and *Cross-Appellees*

v.

CHAN KENDRICK, *et al.*,
Appellees and *Cross-Appellants*

On Appeal from the United States District Court for the District of Columbia

---

BRIEF FOR THE NATIONAL JEWISH COMMISSION ON LAW AND PUBLIC AFFAIRS ("COLPA") AS AMICUS CURIAE

NATHAN LEWIN
MILLER, CASSIDY, LARROCA & LEWIN
2555 M Street, N.W., Suite 500
Washington, D.C. 20037
(202) 293-6400
Counsel of Record

DENNIS RAPPS
NATIONAL JEWISH COMMISSION ON LAW AND PUBLIC AFFAIRS ("COLPA")
450 Seventh Avenue, Suite 2203
New York, New York 10001
(212) 536-0100

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BRIEF FOR THE NATIONAL JEWISH COMMISSION ON LAW AND PUBLIC AFFAIRS ("COLPA") AS AMICUS CURIAE

This brief is filed pursuant to Rule 36.2 of the Rules of this Court with the written consent of all parties. It is submitted by the National Jewish Commission on Law and Public Affairs ("COLPA"), a national organization of volunteer attorneys and social scientists that represents Orthodox Jewish interests, *pro bono publico*, in litigation and before legislatures and administrative agen-

cies. In this case, the brief is filed on behalf of the following organizations:

Agudath Israel of America

National Council of Young Israel

Rabbinical Alliance of America

Rabbinical Council of America

Torah Umesorah, The National Society for Hebrew Day Schools

Union of Orthodox Jewish Congregations of America

Union of Orthodox Rabbis of the United States and Canada

INTEREST OF THE AMICUS CURIAE

The decision of the district court in this case has potentially devastating consequences for many social welfare programs conducted by community organizations operated under Orthodox Jewish auspices. The district court held that a publicly financed social welfare program "fraught with the *possibility*" of religious indoctrination is, *ipso facto*, impermissible under the Establishment Clause. On this basis, the district court disqualified all "religious organizations" from participation in federal programs designed to achieve important secular objectives. Organizations within the Orthodox Jewish community are involved in numerous governmentally funded programs, primarily in the New York area, that serve important secular goals. Although these programs rely, in part, on public funds, they utilize such funds for social welfare purposes, not for religious teaching or indoctrination.

This brief is filed to advise the Court that the factual premise on which Judge Richey based his decision is fundamentally erroneous. It is not "inherent" in a religious organization's participation in a program of training or counseling that "matters sacred to conscience" be taught or discussed. There is, we believe, no foundation in constitutional principle or in experience for the sweeping generalization on which the district court rested its judgment. Religious organizations should be permitted to participate in social welfare programs that have legitimate secular objectives. To the extent that it is shown, in any particular instance, that public funds are *actually* being used for religious indoctrination, judicial remedies are—and always have been—available.

ARGUMENT

I.

THE DISTRICT JUDGE WAS WRONG WHEN HE CONCLUDED, WITH NO SUPPORT IN THE RECORD, THAT IT WAS "SIMPLY UNREALISTIC" FOR RELIGIOUS ORGANIZATIONS TO PARTICIPATE IN SOCIAL WELFARE PROGRAMS WITHOUT INCULCATING RELIGIOUS BELIEFS

The district court's primary constitutional holding—*i.e.*, that the Adolescent Family Life Act ("AFLA") is unconstitutional on its face insofar as it involves the services of religious organizations—rested on Judge Richey's conclusion that such organizations could not participate in counseling and education on the subject of teenage pregnancy without engaging in religious indoctrination. *See Kendrick v. Bowen*, 657 F. Supp. 1547, 1563-1564 (D.D.C. 1987). This was a judicial *ipse dixit*, based on no expert testimony or other credible evidence. It is contrary to fact.

To our knowledge, no Orthodox Jewish organizations have been involved in the administration of the AFLA. But there are analogies to the AFLA in programs that have involved Jewish religious organizations, and counseling has been provided by such organizations under these programs without religious indoctrination.

One example is the area of employment training. With the assistance of public funds, Orthodox Jewish organizations in the New York area have provided career opportunities for thousands of individuals in a variety of fields. Along with training in particular skills, these programs have provided individual and group counseling to equip the trainees for the business world. Specifically, displaced homemakers (such as women who have been recently divorced or widowed) are counseled on adjusting to their new realities. Guidance is also provided to adults with limited English-language ability and to dislocated and older workers.

Given the Orthodox Jewish nature of the organizations providing these services, a disproportionate percentage of its beneficiaries tend to be Orthodox Jews. And in view of the encompassing character of the Orthodox Jewish faith, it is likely that religious questions, such as Sabbath-observance, maintenance of a kosher diet at work, or the wearing of a yarmulke (*see Goldman v. Weinberger*, 106 S.Ct. 1310 (1986)), will arise whenever an Orthodox Jew is employed. Nonetheless, no religious indoctrination or instruction is provided in counseling relating to employment. Indeed, the overwhelming majority of employees involved in these programs are either Jews who are not qualified to teach Jewish religious doctrine or non-Jews.

Other community programs involve guidance for youth and senior citizens. Youth counselors work with various groups, including students in Jewish religious schools to counsel delinquent and potentially delinquent youth. The counselors are employees of Jewish "religious organizations," but the advice they give is secular.

Jewish organizations also conduct counseling programs in the area of family relations. Couples experiencing marital discord or tension, and inability to cope with emotional problems, are advised by counselors who are financed, in part, by government grants. In New York,

these programs sometimes specialize with a particular ethnic or religious group, such as the Hasidic community. Counselors who are familiar with the community and whose expertise includes knowledge of Orthodox religious ritual and principle are assigned to such a distinctive community.

These counseling services do not constitute religious instruction or indoctrination. They proceed, to be sure, within the clients' frame of reference, which includes devout religious observance. But it is simply inaccurate to describe the services as a form of "advancement of religion."

In short, even religious organizations that are "pervasively sectarian," in the sense that their charters require them to adhere to Orthodox Jewish principles and forbid deviations from Jewish religious doctrine,* customarily provide religiously neutral counseling and guidance in many programs that obtain public funding. By a process of self-selection, those who seek such assistance come primarily from the Orthodox Jewish community. These programs do not, however, discriminate in whom they serve, and many non-Jews benefit from them. The assistance given in these circumstances is not, as Judge Richey assumed, inevitably "pressure on 'matters sacred to conscience.'" 657 F. Supp. at 1563. Nor is it "unrealistic" to assume that religious beliefs will not infuse such instruction or guidance. In fact, the experience of Orthodox Jewish organizations has proved the opposite. Guidance in secular areas has been secular in content, even while being sensitive to the religious convictions of those to whom it is administered.

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* Although the district court viewed organizations that are totally committed to religious principle as "pervasively sectarian," we note that such groups frequently provide services that ar entirely secular. We do not, therefore, agree with Judge Richey's definition of the term "pervasively sectarian."

II.

THE DISTRICT JUDGE ERRED IN ENJOINING THE FUNDING OF ACTIVITIES THAT WERE NOT PROVEN, BY A PREPONDERANCE OF THE EVIDENCE, TO BE UNCONSTITUTIONAL

The district court's decision was not based on actual experience or on facts in the record. It was rendered on the bare "possibility" of religious indoctrination. This approach affected not only the portion of Judge Richey's opinion that invalidated the AFLA on its face (657 F. Supp. at 1562-1564), but also that portion of the opinion that held the law to be invalid as applied (657 F. Supp. at 1564-1567). Such invalidation of a federal statute on the basis of a speculative risk was wholly inappropriate.

The district judge declared, in ruling against the AFLA on its face, that the "possibility alone" of religious instruction or indoctrination "amounts to an impermissible advancement of religion." 657 F. Supp. at 1563. In so doing, Judge Richey mistakenly engrafted upon social welfare legislation the extremely rigorous standard that this Court has applied to primary or secondary education conducted in the surroundings of a sectarian school. Compare *Grand Rapids School District v. Ball*, 473 U.S. 373, 388-389 (1985).

The district court ignored various constitutional principles that limit the reach of the rule utilized in the *Grand Rapids* case. *First*, it is clear from this Court's decisions that classroom education is *sui generis*, and that constitutional rules that apply to education do not govern non-educational or non-classroom situations. *Second*, for purposes of the Establishment Clause this Court has consistently distinguished between impressionable children and those who are more mature and independent—including college-age youngsters. *See, e.g., Tilton v. Richardson*, 403 U.S. 672, 685-687 (1971). In dealing

with teenage pregnancies, the AFLA straddles these age classifications. Judge Richey assumed that the constitutional rules governing "impressionable youngsters" are in effect (657 F. Supp. at 1561), without considering all the age groups covered by the AFLA and the question whether those who are within the statute's reach are all of "impressionable" age.

In finding the AFLA unconstitutional as applied, Judge Richey also failed to limit his conclusions to evidence established by the record. He determined that some of the religious organizations involved in the AFLA program were "pervasively sectarian" and that several had "explicit corporate ties to a particular religious faith and by-laws or policies that prohibit any deviation from religious doctrine." 657 F. Supp. at 1564-1565. Because he felt that the subject of the counseling was "inseparable from religious dogma," he arrived at "the inescapable conclusion . . . that federal funds have been used by pervasively sectarian institutions to teach matters inherently tied to religion." 657 F. Supp. at 1565.

The district judge's conclusion was not "inescapable." Nor was it necessarily true that the guidance given to adolescents on the subject of pregnancy was "inseparable" from doctrinal teachings of the religious organizations. To be sure, it was *possible* for religious instruction to be included in such guidance, but the inference that such instruction was actually given could not be drawn from the evidence before Judge Richey.

More serious, however, was the district court's conclusion that if there was one or more instances in which the line had been crossed, the statute would have to be invalidated to the extent that it authorized all funding of activities of any "religious organization." Such a rule punishes *all* "religious organizations" for the sins of a few.

If, in fact, a particular "religious organization" has used its participation in a governmentally financed pro-

gram as a means of teaching religion in violation of the Establishment Clause, courts are available to issue disqualifying injunctive remedies regarding that program and the particular religious organization. Judge Richey was not truly invalidating the AFLA "as applied" when he swept away *all* religious organizations, regardless of how carefully they administered their programs, because one or two were believed by him to be violating the strictures of the Establishment Clause.

This argument does not depend at all on how "pervasively sectarian" the religious organization happens to be. It is, of course, unfair to treat alike all organizations that profess adherence to religious principles, whether or not they are "pervasively" religious. But even groups that may fairly be characterized as "pervasively religious" engage in significant secular activities. Their "pervasively religious" quality should not disqualify them from participation in social welfare programs designed to assist their adherents, as well as others, in meeting the challenges of the modern world.

III.

THE DISTRICT COURT SHOULD NOT HAVE FOUND UNCONSTITUTIONAL "ENTANGLEMENT" WHEN NO GOVERNMENTAL SURVEILLANCE IS CONTEMPLATED

Judge Richey believed that constitutional limits could be maintained only by "extensive and continuous monitoring" that would violate the non-entanglement rule of *Lemon v. Kurtzman*, 403 U.S. 602, 614-615, 622 (1971). 657 F. Supp. at 1567-1568. If the AFLA established a monitoring system that required such surveillance, the district judge's point might have merit. But the statute presumes—as Congress had every right to do—that religious organizations will abide by constitutional strictures. Congress created no surveillance system, relying instead on the availability of administrative or judicial

remedies if any particular religious organization overstepped proper bounds.

In this portion of his opinion, Judge Richey again leaped to the conclusion that the Constitution would be violated—this time by "extensive and continuous monitoring"—when no evidence warranting that conclusion was in the record. Here, as in *Hunt v. McNair*, 413 U.S. 734, 746 (1973), and in *Roemer v. Board of Public Works*, 426 U.S. 736, 762 (1976), the potential for government surveillance is more speculative than real.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed.

Respectfully submitted,

NATHAN LEWIN
MILLER, CASSIDY, LARROCA & LEWIN
2555 M Street, N.W., Suite 500
Washington, D.C. 20037
(202) 293-6400
Counsel of Record

DENNIS RAPPS
NATIONAL JEWISH COMMISSION
ON LAW AND PUBLIC AFFAIRS
("COLPA")
450 Seventh Avenue, Suite 2203
New York, New York 10001
(212) 536-0100

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On Appeal From the United States District Court for the District of Columbia

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BRIEF FOR THE ATTORNEYS GENERAL OF ARIZONA, LOUISIANA, MISSOURI, NEW HAMPSHIRE, NEW MEXICO, UTAH, AND WASHINGTON AS AMICI CURIAE IN SUPPORT OF APPELLANT

Of Counsel:
JAMES S. CAMPBELL
WILMER, CUTLER & PICKERING
2445 M Street, N.W.
Washington, D.C. 20037

GARY B. BORN
Counsel of Record
R. SCOTT KILGORE
WILMER, CUTLER & PICKERING
2445 M Street, N.W.
Washington, D.C. 20037
(202) 663-6000

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-431

OTIS R. BOWEN, SECRETARY OF
HEALTH AND HUMAN SERVICES,
Appellant

v.

CHAN KENDRICK, *et al.*,
Appellees

On Appeal From the United States District Court for the District of Columbia

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BRIEF FOR THE ATTORNEYS GENERAL OF ARIZONA, LOUISIANA, MISSOURI, NEW HAMPSHIRE, NEW MEXICO, UTAH, AND WASHINGTON AS AMICI CURIAE IN SUPPORT OF APPELLANT

This amicus curiae brief is submitted in support of appellant Otis R. Bowen, Secretary of Health and Human Services. By letters filed with the Clerk of the Court, appellant and appellees Chan Kendrick, Reverend Robert E. Vaughn, Reverend Lawrence W. Buxton, Dr. Emmett W. Cocke, Jr., Shirley Pedler, Reverend Homer A. Goddard, Joyce Armstrong, John Roberts and The American Jewish Congress have consented to the filing of this brief.

INTEREST OF AMICI CURIAE

Amici curiae are the Attorneys General of Arizona, Louisiana, Missouri, New Hampshire, New Mexico, Utah, and Washington. These States devote substantial resources to welfare programs that provide vital social services for the misfortunate and less-privileged. As de-

scribed below, many State welfare programs involve private organizations, including both religious and nonreligious groups. The district court's decision threatens to disrupt these welfare programs and the social services they provide. The amici curiae are responsible for defending the legality of the welfare programs in their States and for coping with the social consequences of any disruption in welfare services. The amici curiae accordingly have a direct interest in this case.

STATEMENT

This case involves an Establishment Clause challenge to a social welfare program administered by the Federal Government. The challenged program was established by the Adolescent Family Life Act, 42 U.S.C. 300z *et seq.* (1982) ("AFLA"), which authorized appropriations "for services and research in the area of premarital adolescent sexual relations and pregnancy." S. Rep. No. 161, 97th Cong., 1st Sess. 1 (1981). The AFLA was enacted after Congress concluded that premarital adolescent pregnancy and childbirth caused "severe adverse health, social, and economic consequences." 42 U.S.C. 300z(a)(5) (1982).

To combat these social ills, AFLA authorized funding for "prevention services" and "care services" for adolescents and their families.[1] Like many other government welfare programs, AFLA funding is available to "religious and charitable organizations, voluntary associations, and other groups in the private sector." 42 U.S.C. 300z-5(a)(21)(B) (1982). There are two major limitations on appropriations under the Act. First, no

[1] These services include: (A) pregnancy testing; (B) mental and physical health services; (C) referral for venereal diseases, pediatric care, residential care, and mental health services; (D) adoption counselling; (E) sex education; (F) child care; (G) transportation; (H) outreach services and counselling for families; and (I) family planning. 42 U.S.C. 300z-1(a)(4) (1982).

grants may be made for abortion, abortion counselling, or certain abortion referrals. 42 U.S.C. 300z-10(a) (1982). Second, the Act's legislative history explicitly prohibits "the use of [AFLA] funds to promote religion, or to teach the religious doctrines of a particular sect." S. Rep. No. 496, 98th Cong., 2d Sess. 10 (1984); S. Rep. No. 161, 97th Cong., 1st Sess. 15-16 (1981).

The district court declared AFLA unconstitutional, both on its face and as applied, "insofar as religious organizations are involved in carrying out the programs and purposes of the Act." *Kendrick v. Bowen*, 657 F. Supp. 1547, 1551 n.2, 1570 (D.D.C. 1987). Relying on this Court's parochial school decisions, the lower court held that AFLA has the "primary effect" of advancing religion, both on its face and as applied. The court also held AFLA facially unconstitutional because it "entangles" government with religion.

SUMMARY OF ARGUMENT

This case requires the Court to decide fundamental questions regarding the Nation's social welfare programs. Since the founding of the Republic, religious organizations have cooperated with federal, state and local governments in caring for the unfortunate and less-privileged. In contrast to government aid to parochial schools, cooperation in the social welfare field has produced relatively little controversy. Instead, for nearly 200 years, this cooperation has provided food, shelter, medical care and other essentials to millions of needy Americans. The lower court's decision threatens to disrupt these long-established patterns of religious-governmental cooperation and the social services they provide.

The district court erred by applying the three-prong *Lemon* test, which was fashioned in the uniquely sensitive context of primary and secondary education. Particularly intensive scrutiny of governmental aid in this field has been justified by an unusual constellation of factors,

including historical controversy, the role of public schools in fostering national cohesion, and the potential of parochial schools for religious indoctrination. Because these factors are largely absent in the social welfare field, it is inappropriate to apply the *Lemon* test in this case.

The appropriate standard in this case should instead be derived from *Bradfield v. Roberts*, 175 U.S. 291 (1899)—this Court's only Establishment Clause decision in the social welfare context. Under *Bradfield*, governmental aid to religious groups is permissible if the assistance is: (1) neutrally available to both religious and nonreligious groups; and (2) used for secular social welfare services. AFLA clearly survives any constitutional challenge under *Bradfield*'s analysis. First, the Act neutrally provides funding to both religious and nonreligious groups. Second, AFLA funding is available for social welfare services which are plainly secular (including transportation and medical treatment). Because there are indisputably circumstances in which religious groups could constitutionally provide these services, the district court erred in holding AFLA as a whole unconstitutional on its face. *United States v. Salerno*, 107 S. Ct. 2095 (1987).

AFLA's appropriations for counselling on sexual relations and abortion are also facially constitutional. As Congress's findings demonstrate, these are legitimate subjects of secular concern which can readily be dealt with in a secular, nonreligious manner. The fact that some government-funded advice about sexual matters "happens to coincide or harmonize with the tenets of some or all religions" is irrelevant. *Harris v. McRae*, 448 U.S. 297 (1980).

The district court also erred in striking down the Act "as-applied." In addition to ignoring Congress's prohibition against funding for religious indoctrination, the court failed to examine rigorously either the individual AFLA grantees or their services. Absent adequate findings on

these issues, there is no basis for the lower court's conclusion that AFLA funds were used for "religious," rather than "secular," activities.

ARGUMENT

I. THE ESTABLISHMENT CLAUSE SHOULD BE INTERPRETED IN LIGHT OF THE LONG TRADITION OF COOPERATION BETWEEN RELIGIOUS GROUPS AND GOVERNMENT AGENCIES IN PROVIDING SOCIAL WELFARE SERVICES

The Court has often recognized "the special relevance in [the Establishment Clause] area of Mr. Justice Holmes' comment that 'a page of history is worth a volume of logic.'" [2] Thus, the Court's parochial school decisions have relied extensively on the fact that the "subsidy of sectarian educational institutions became embroiled in bitter controversies very soon after the Nation was formed." [3] These decisions also relied on the prohibitions against parochial school aid adopted during the 19th century in many States, usually by constitutional amendment. In Justice Brennan's words, "for more than a century, the consensus, enforced by legislators and

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[2] *Committee for Public Educ. v. Nyquist*, 413 U.S. 756, 777 n.33 (1973). *See also Walz v. Tax Comm'n*, 397 U.S. 664, 675-76 (1970); *Wallace v. Jaffree*, 472 U.S. 38, 79 (1985) (O'Connor, J., concurring).

[3] *Lemon v. Kurtzman*, 403 U.S. 602, 645 (1971) (Brennan, J., concurring). *See Id.* at 611-14, 624-25; *Id.* at 628-30 (Douglas, J. concurring) ("conflict and dissention" "often erupting into violence"); *Everson v. Board of Educ.*, 330 U.S. 1, 14 (1947); *Id.* at 23 (Jackson, J., dissenting) ("It is no exaggeration to say that the whole historic conflict in temporal policy between the Catholic Church and non-Catholics comes to a focus in their respective school policies."); *Id.* at 33 (Rutledge, J., dissenting); *Illinois ex rel. McCollum v. Board of Educ.*, 333 U.S. 203, 210-211 (1948); *Id.* at 213-20 (Frankfurter, J., concurring) ("the Remonstrance of James Madison, an event basic in the history of religious liberty, was called forth by a proposal which involved support to religious education").

courts with substantial consistency, has been that public subsidy of sectarian schools constitutes an impermissible involvement of secular with religious institutions." [4]

Historical experience has been equally important in the frequent rejection of Establishment Clause challenges outside the parochial school context. Thus, the Court relied heavily on historical practice in upholding tax exemptions for religious groups, government funding for legislative chaplains, and religious displays.[5] In these and other areas, the Court has repeatedly "refused 'to construe the Religion Clauses with a literalness that would undermine the ultimate constitutional objective *as illuminated by history*.'" [6]

Social welfare services have historically been controlled at the state and local levels.[7] As a result, social welfare programs and patterns of religious-governmental cooperation have varied from locality to locality. Although this local diversity makes it difficult to draw generalizations, several historical themes are clear.

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[4] *Lemon v. Kurtzman*, 403 U.S. at 647-49 (Brennan, J., concurring) (listing State constitutional prohibitions against aid to sectarian schools); *Everson v. Board of Educ.*, 330 U.S. at 13-15.

[5] *See Walz v. Tax Comm'n*, 397 U.S. at 678; *Marsh v. Chambers*, 463 U.S. 783, 792 (1983); *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984).

[6] *Lynch v. Donnelly*, 465 U.S. at 678, *quoting Walz v. Tax Comm'n*, 397 U.S. at 671 (emphasis in *Lynch*).

[7] "Public welfare has always been recognized as a responsibility of local government in the United States." M. Stevenson, *Public Welfare Administration* 67, 85 (1938). *See* Bremner, *Private Philanthropy and Public Needs: Historical Perspective* 95 reprinted in Commission on Private Philanthropy and Public Needs, *Research Papers* 89 (Dep't of Treasury 1977) [hereinafter *"Public Needs"*]; J. Leiby, *A History of Social Welfare and Social Work in the United States* 3-4, 25-26, 97-104 (1978) [hereinafter *"Social Welfare"*].

First, governmental aid to religious groups in the social welfare field has a long, well-established history and has played a significant role in providing social services in the United States. In the words of one authority, "[f]or over a hundred years there has existed in the United States a partnership between local governments and sectarian welfare." [8] As another commentator described:

> Until the turn of the century, local private religious and charitable organizations provided most of the relatively few social welfare services then available in this country. . . . As the cost of services began to exceed the available funds of the private charities, state and local governments began to subsidize these efforts of private welfare groups and to establish their own welfare agencies. This relationship between the Church and local governments has continued to the present day.[9]

In short, for much of the Nation's history, "[c]haritable organizations with religious affiliations . . . have provided social services with the support of . . . communities and without controversy." [10]

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[8] B. Coughlin, *Church and State in Social Welfare* 44, 129 (1965) ("there is a long legal history of government aid to sectarian health and welfare services") [hereinafter *"Church-State"*].

[9] Pickrell & Horwich, *"Religion as an Engine of Civil Policy,"* 44 Law & Contemp. Probs. 111, 112 (1981) [hereinafter *"Civil Policy"*].

[10] S. Rep. No. 496, 98th Cong., 2d Sess. 10 (1984). *See also* Stein, *Jewish Social Work in the United States, 1654-1954*, 14 in American Jewish Committee, *American Jewish Year Book* (1956) ("Sectarian auspices for charitable organizations was part of the American cultural landscape throughout the nineteenth century.") [hereinafter *"Jewish Social Work"*]; R. Bremner, *The Public Good: Philanthropy and Welfare in the Civil War Era* 184 (1980) ("Many voluntary associations [including sectarian groups] received aid from the public treasury"); J. Pratt, *Religion, Politics, and Diversity* 204-05 (1967) ("The policy of public support for private char-

Countless historical examples illustrate the long tradition of religious-governmental cooperation in the social welfare field. Thus, in California "[p]ayment of public tax funds to institutions caring for children has been the practice for decades." [11] In Kentucky, public subsidies to religious social welfare organizations were "widespread in all levels of government, state, county, and municipal" from before the turn of the century.[12] State assistance to religious groups in Missouri dates to at least 1838, with substantial assistance continuing through the 1900's.[13] In Wisconsin, a number of hospitals, orphanages, and other welfare institutions were historically operated by religious groups with public assistance.[14] In Pennsylvania, "subsidies to private agencies [had been granted] at least since 1751" and in "1929 the state granted subsidies of $3,144,050 for hospitals and an additional half million for institutions for the aged, dependent children, and others." [15]

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itable institutions was developed almost by accident in the first half of the nineteenth century.") [hereinafter *"Diversity"*]; *Public Needs*, at 103 ("throughout the greater part of American history, governmental and voluntary forces have cooperated and collaborated in meeting public needs"); G. Grob, *Mental Institutions in America: Social Policy to 1875* 82-83 (1973); *Social Welfare*, at 48-70, 75-85 ("For a long time many states and municipal authorities had helped or stimulated private philanthrophy by means of grants and concessions.").

[11] V. Bornet, *California Social Welfare* 251 (1956) (noting payments to various religious institutions).

[12] E. Sunley, *The Kentucky Poor Law 1792-1936* 30-34 (1942) (describing county and city aid to various religious groups).

[13] P. McCandless, *A History of Missouri 1820-1860* (1972); F. Boan, *A History of Poor Relief Legislation and Administration in Missouri* 48-51 (1941).

[14] R. Current, *The History of Wisconsin* 185-87, 514 (1976).

[15] A. Miles, *An Introduction to Public Welfare* 148 (1949).

Second, popular opposition to religious-governmental cooperation in the social welfare field was a relatively minor historical factor. Indeed, a sharp distinction was frequently drawn between aid for religious *social welfare* institutions (which was often expressly permitted) and aid for sectarian *schools* (which was forbidden in a number of States).[16] An overwhelming majority of State constitutions either did not forbid aid to religious organizations or prohibited aid to sectarian *schools* while specifically allowing public aid to religious groups for *social welfare* purposes.[17] A minority of the States did adopt constitutional amendments during the mid- to late-19th century more broadly forbidding state appropriations to "sectarian" institutions.[18] Nonetheless, even in these States, judicial decisions often permitted public aid for social welfare services provided by religious groups.[19]

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[16] *See Social Welfare*, at 85 ("Ultimately there was a practical compromise whereby the courts would accept public subsidies to private welfare and health institutions but not to schools."); *Church-State*, at 129 ("There is a long legal history of government aid to sectarian health and welfare services. . . . [T]he *courts have long distinguished government aid to sectarian welfare from government aid to sectarian education.*") (emphasis added); Giannella, *Religious Liberty, Nonestablishment and Doctrinal Development: Part II, The Nonestablishment Principle*, 81 Harv. L. Rev. 513, 554-60 (1968) [hereinafter *"Nonestablishment Principle"*]; Guilfoyle, *Church-State Relations in Welfare*, 3 Cath. Law. 112, 117 (1957).

[17] *See* Appendix A.

[18] *See* Appendices B and C.

[19] *See* Appendix B.

This distinction between aid for *social welfare* and aid for parochial *schools* was also sharply drawn in the Senate debates on the short-lived "School Amendment" in 1876. These debates focussed on a proposal by James Blaine to amend the U.S. Constitution to forbid the States from using public school funds for sectarian schools. 4 Cong. Rec. 5580 (1876). In addition, a broader proposal was suggested in the Senate debates which arguably would have prevented the States from providing financial assistance to *any*

The history of aid to religious institutions in New York illustrates the sharp distinction that was ultimately drawn in many States between schooling and social welfare. Public assistance was provided to religious welfare organizations in New York from the early 1800's and "these institutions soon became integral parts of the poor relief system in the state." [20] Nonetheless, sectarian disputes led to proposals in the late 1800's to restrict aid to religious groups.[21] Importantly, however, assistance for social welfare purposes came to be viewed very differently from aid to sectarian schools. Thus, the 1894 Constitutional Convention resulted in amendments that cut off public assistance to *parochial schools*, but expressly refused to halt local aid to religious *welfare institutions*.[22]

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religious institution. *Id.* Of course, both proposals failed. Among other things, however, the debate revealed that there was virtually no support for halting aid to religious groups for social welfare purposes. Thus, some Senators who supported a ban on State aid to sectarian schools opposed any prohibition on aid for social welfare purposes. *E.g.*, 4 Cong. Rec. 5580, (Mr. Kernan); 4 Cong. Rec. 5454-56 (Mr. Randolph). Moreover, almost all supporters of either proposal denied that the amendments would prohibit aid to religious groups for social welfare purposes. *Id.* at 5584, 5585, 5594 (Mr. Christiancy, Mr. Morton). ***But cf.*** 4 Cong. Rec. 5561-62 (Mr. Frelinghuysen referring to "theological institutions, sectarian colleges, monasteries, and nunneries"). Finally, several Senators flatly expressed their opposition to any prohibition on State aid for social welfare purposes. 4 Cong. Rec. 5580-83, 5592, 5593 (Mr. Kernan, Mr. Eaton). Similarly, President Grant's 1876 State of the Union Address proposing the "School Amendment" referred only to the need for non-sectarian public schools, 4 Cong. Rec. 174, 181 (1875). *See also* 4 Cong. Rec. 5189 (House debate focussing only on aid to sectarian schools).

[20] *Diversity*, at 206-11. Appropriations to religious groups increased markedly through the 1850s and 1860s. *Id.* at 209-11. *See also* D. Schneider, *The History of Public Welfare in New York State 1609-1866* 190-91 (1938) [hereinafter *"Public Welfare."*]

[21] *Diversity*, at 215-55; *Public Welfare*, at 126-29.

[22] *Diversity*, at 254. *See* N.Y. Const. Art. 8, § 1 and Art. 11, § 3 (1895).

This compromise "did not please extremists," but it provided a "settlement that placed the explosive sectarian issue beyond the reach of partisan contention." [23] In subsequent years, public appropriations to religious welfare institutions in New York increased dramatically,[24] without significant popular opposition.[25]

A similarly pragmatic and durable compromise occurred in Louisiana. Like many other States, public appropriations were made to religious welfare institutions in Louisiana as early as 1820.[26] Public assistance had reached substantial proportions by 1879,[27] when popular opposition resulted in a constitutional amendment forbidding appropriations from the state treasury for "any church, sect or denomination or religion [or] for private,

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[23] *Diversity*, at 255. Subsequent New York judicial decisions consistently approved the continuation of public aid to religious social welfare institutions. *E.g., Sargent v. Board of Educ.*, 69 N.E. 722 (N.Y. 1904).

[24] *Diversity*, at 267-70 ("By 1914, New York City was appropriating five million dollars annually to provide welfare services, [principally] institutions conducted by one or another of the three major religious faiths.").

[25] *Id.* at 269-70 ("This compromise, observed and maintained by the state legislature, the Board of Charities, local authorities, and the state courts, has continued in the present century. . . . With the passing years, both Catholics and non-Catholics have observed the spirit of the 1894 settlement of the school and charities questions."); *Social Welfare*, at 85.

[26] E. Wisner, *Public Welfare Administration in Louisiana* 187-89 (1930) (detailing aid to numerous different Catholic, Protestant and Jewish hospitals, asylums, orphanages, and homes for the aged); E. Wisner, *Social Welfare in the South* 92-93 (1970).

[27] E. Wisner, *Public Welfare Administration in Louisiana* 189-92 (1930); E. Beven, *City Subsidies to Private Charitable Agencies in New Orleans* 24-26 (1934) [hereinafter *"City Subsidies"*].

charitable or benevolent purposes."[28] Nonetheless, public subsidies to religious social welfare groups by *municipal* authorities were allowed, and these dramatically increased in the years following 1880.[29] Similar solutions, based on the principle of local autonomy, were reached in other States.[30]

In summary, religious groups have played vital roles in federal, state, and local welfare programs for nearly 200 years. Moreover, this deeply-rooted religious-governmental cooperation has provoked relatively little popular opposition. In dramatic contrast to parochial school aid, no popular consensus emerged against public subsidy of religious welfare programs. On the contrary, most States arrived at pragmatic, durable compromises permitting public assistance to religious groups for social services. This long history of religious-governmental cooperation, which so sharply distinguishes the social welfare and parochial school contexts, should play a substantial role in interpreting the Establishment Clause.

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[28] La. Const. Art. 51 (1879). *Compare* La. Const. Art. 1, § 8.

[29] *City Subsidies*, at 25-29. *See also* R. Dripps, *The Policy of State Aid to Private Charities* 460-62, in *Proceeding of the National Conference of Charities and Correction* (1915) [hereinafter "*Private Charities*"]. Louisiana courts upheld local aid to religious welfare institutions. *State ex rel. Orr v. City of New Orleans*, 50 La. Ann. 880, 24 So. 666 (1898); La. Ops. Att'y Gen. 837 (1938-40); *Id.* at 2154 (1940-42).

[30] *See Private Charities*, at 460-62 (showing 24 states providing assistance to private charities in 1914 and noting tendency towards "greatly increased" county and city aid to private charities in other states); *Social Welfare*, at 75-85; A. Miles, *An Introduction to Public Welfare*, 148-51 (1949) ("The subsidy system became so well established . . . that by 1929 twenty-four states appropriated more than seven million dollars to private charities. In all but five states local authorities were authorized to make payments to private agencies and institutions."). *See also* Va. Const. Art. IV, § 16 and Va. Code 15.1-24-26, described in Appendix A; *Schade v. Allegheny County Inst. Dist.*, 386 Pa. 507, 126 A.2d 911 (1956).

II. RELIGIOUS GROUPS CONTINUE TO PLAY A VITAL ROLE IN CONTEMPORARY GOVERNMENTAL SOCIAL WELFARE PROGRAMS

Compelling public policies have led federal, state and local governments to continue their historic cooperation with religious groups in the social welfare field. Religious groups usually provide welfare services more efficiently and effectively than governmental agencies.[31] This is in part because religious groups often show greater "individual interest, creativity and responsibility" than their governmental counterparts, and in part because of greater experience and expertise.[32] Finally, the participation of religious groups increases the diversity of welfare services, which in turn broadens the appeal of governmental programs.[33]

Because of these compelling public policies, federal, state and local governments continue to provide substantial funding to religious groups for contemporary social welfare programs.[34] In one commentator's words, "[t]here

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[31] Religious groups often have existing facilities, as well as greater access to volunteer help or in-kind contributions than governmental agencies. *Diversity*, at 254; Guilfoyle, *Church-State Relations in Welfare*, 3 Cath. Law. 112, 117-20 (1957). In addition, religious organizations generally have extensive community contacts that governmental agencies often lack. *See* Judicial Review Hearings before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary, 86th Cong., 2d Sess. 132, 142-43 (1966) [hereinafter "*Judicial Review Hearings*"] (antipathy to "public authorities" makes church-affiliated organizations more effective).

[32] *Nonestablishment Principle*, at 555; *Church-State*, at 133-37; *Social Welfare*, at 75-89.

[33] McConnell, *Political and Religious Disestablishment*, 1986 B.Y.U. L. Rev. 405, 421 [hereinafter "*Disestablishment*"]; *Judicial Review Hearings*, at 132, 142-43; *Church-State*, at 128, 133-41 ("in a pluralistic society good social services . . . must be based on the principle of pluralism").

[34] Governmental funding of religious groups takes a variety of forms, including contracts for services, competitive grants to carry

are today many instances of direct state support of the welfare programs of churches and religious agencies." [35] Although there is apparently little detailed information about the precise extent of government aid to religious groups to provide social services,[36] the magnitude of such assistance is very substantial. Thus, a 1965 study concluded that "[a]n extremely large number of [religious welfare agencies], 71 percent, have contractual agreements with government agencies whereby they receive tax funds, usually by way of selling services to government." [37] More recently, a 1977 study sponsored by the Commission on Private Philanthropy and Public Needs concluded that Jewish and Catholic religious-related agencies engaged in social welfare work received 35.4% of their grants and contributions from governmental sources.[38] Reports by various religious groups, including

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out specific governmental programs, and fee reimbursement for services provided to individuals at the request of governmental agencies. *See Disestablishment*, at 420-21. The services performed by religious groups run the gamut of social service functions, from care for the homeless and aged to adoption services and day care to counseling, sexual abuse therapy, drug rehabilitation and medical care.

[35] *Nonestablishment Principle*, at 554; Guilfoyle, *Church-State Relations in Welfare*, 3 Cath. Law. 112, 117-19 (1957).

[36] *See Church-State*, at 58 (1965); Interfaith Research Committee, *A Study of Religious Receipts and Expenditures in the United States* 365 (1977) [hereinafter *"Interfaith Study"*], reprinted in Commission on Private Philanthropy and Public Needs, *Research Papers* (1977); Urban Institute, *The Reagan Experiment* 232 (1982).

[37] *Church-State*, at 74. The study also found that many religious organizations receive more than 50% of their income from government sources. *Id.*

[38] *Interfaith Study*, at 372, Table 1. If earnings, service fees, and "other" income are included, governmental grants account for 12.5% of total receipts. Jewish and Catholic religious-related agencies received some 56% of such receipts from "service fees." The extent of government responsibility for payment of service fees is not clear, but could be substantial. The study did not in-

Catholic Charities, Lutheran Social Services and Jewish Federations, reveal similar levels of governmental funding.[39]

Religious-governmental cooperation is particularly important at the state and local level. Cogent evidence of this is provided by state block grant plans, which illustrate the broad spectrum of social services provided by private religious and nonreligious organizations.[40] Similar evidence is supplied by contemporary state court decisions and commentary about social welfare services in particular states.[41] These sources, combined with extensive religious-governmental cooperation at the federal level,[42]

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clude Protestant religious-related agencies in these figures, *id.* at 372, although government payments and service fees appear to play an equally important role in Protestant welfare services. *Id.* at 371.

[39] *See* Catholic Charities USA, *1986 Annual Survey* 6, Table II.1 (showing "Government Fees and Grants" as 44.7% of income of Catholic Charities agencies total cash income in 1986 of $603,876,037). *See also* C. Chakerian, *The Churches and Social Welfare* 20 (1955); D. Gavin, *The National Conference of Catholic Charities* 176-77 (1962); J. O'Grady, *Catholic Charities in the United States* 183-225 (1930); II D. McColgan, *A Century of Charity* 439 (1951).

See 1986 Annual Report—Lutheran Social Services of Minnesota (68% of $16.6 million annual budget received from goverment fees and grants).

See Jewish Federation of Metropolitan Chicago—Annual Federation Report for 1986 (21% of $58 million budget from governemnt sources); *Jewish Social Work*, at 68-70, 256-61.

[40] *E.g., New Hampshire State Block Grant Plan, FY1986; Mississippi State Block Grant Plan, FY1986; Missouri State Block Grant Plan, FY1987* 7-13.

[41] *E.g.*, V. Bornet, *California Social Welfare* 251 (1956); A. Miles, *An Introduction to Public Welfare* 148-51 (1949). *See* cases cited in Appendices A & B.

[42] For descriptions of federal programs giving assistance to religious groups providing social welfare services, *see Judicial Review Hearings*, at 112-22, 367-78 (Memoranda of Department

demonstrate that religious-governmental cooperation continues to play a vital role in providing social welfare services. Disrupting this well-established tradition would seriously jeopardize a substantial portion of the Nation's most effective social services.

III. THE ESTABLISHMENT CLAUSE DOES NOT FORBID THE PARTICIPATION OF RELIGIOUS GROUPS IN GOVERNMENTAL SOCIAL WELFARE PROGRAMS LIKE THE ADOLESCENT FAMILY LIFE ACT

A. The District Court Erred By Mechanically Applying Parochial School Precedents in the Social Welfare Context

The three-prong *Lemon* test guides the "general nature" of Establishment Clause inquiry in parochial school cases. Nonetheless, even in this context, the Court has "emphasized that [the *Lemon* test] provides 'no more than [a] helpful sign-post.'" [43] More importantly, in cases not involving parochial schools, the Court has "repeatedly emphasized [its] unwillingness to be confined to any single test or criterion." [44] Consistent with this conviction that "no fixed, *per se* rule can be framed," the Court has frequently refused to apply the *Lemon* test outside the

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of Health, Education and Welfare). *See also* Brief on Behalf of the United States in *Bradfield v. Roberts*, 175 U.S. 291 (1899), at 11-12 ("It is a well-known fact that Congress has incorporated in the District of Columbia many . . . religious societies, some expressly under church auspices, and has made grants to such"; "it has been the practice of Congress for many years to make provision for the care of the sick and . . . for other objects of charity and reform, through appropriations for private institutions.").

[43] *Mueller v. Allen*, 463 U.S. 388, 394 (1983) (quoting *Hunt v. McNair*, 413 U.S. 734, 741 (1973)).

[44] *Lynch v. Donnelly* 465 U.S. at 679.

context of primary and secondary schooling.[45] There are good reasons for limiting the *Lemon* test to cases involving the "sensitive relationship between government and religion in the education of our children." [46] As described below, an unusual constellation of problems arises from this "sensitive" educational relationship, which is largely absent in other areas, particularly the social welfare context.

A leading justification for the three-prong test has been the history of sharp controversy surrounding aid to parochial schools and the "consensus" among the States against such aid. As detailed above, no comparable history exists in the social welfare context. On the contrary, religious-governmental cooperation in the social welfare field is a well-established tradition that State constitutions often specifically preserve. This cooperation has produced a "harmonious relationship" with "beneficial and stabilizing influences in community life" that the Court has encouraged in other circumstances.[47]

A second justification for the *Lemon* test has been the felt need to safeguard the Nation's public schools. Descriptions in seminal Establishment Clause cases of the vital role of public schools illustrate the importance of this concern in the Court's reasoning. According to Justice Frankfurter, "[t]he public school is at once the symbol of our democracy and the most pervasive means for promoting our common destiny." [48] Justice Brennan has voiced similar views: "It is implicit in the history and character of American public education that the public

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[45] *Id.* at 678. *E.g., Marsh v. Chambers*, 463 U.S. 783 (1983); *Larson v. Valente*, 456 U.S. 228 (1982).

[46] *Grand Rapids School Dist. v. Ball*, 473 U.S. 373, 383 (1985).

[47] *Walz v. Tax Comm'n*, 397 U.S. 664, 672-73 (1970).

[48] *Illinois ex rel. McCollum v. Board of Educ.*, 333 U.S. 203, 231 (1948) (Frankfurter, J., concurring). *See also* Wood, *Religion and the Public Schools*, 1986 B.Y.U.L. Rev. 349.

schools serve a uniquely *public* function: the training of American citizens in an atmosphere free of parochial, divisive, or separatist influences of any sort." [49]

Given this view of public schools, the Court has repeatedly expressed its concern that religious-governmental cooperation could undercut the role of public schools in fostering national cohesion.[50] In addition, the Court has stressed the competition and "occasional rivalry" between sectarian schools and public schools, as well as the "internal pressures" driving state aid to parochial schools.[51] For these reasons, government aid to sectarian schools has been viewed with especial disfavor: "[i]n no activity of the State is it more vital to keep out divisive forces than in its schools." [52]

Concerns about the Nation's public schools have little application in the social welfare context. Despite the vital importance of welfare assistance to the needy, social welfare programs simply do not have the same role in fostering national cohesion that public schools do. Similarly, governmental welfare agencies seldom face a competitive threat from religious groups and instead have long cooperated successfully with such groups.

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[49] *Lemon v. Kurtzman*, 403 U.S. at 658 (Brennan, J., concurring), *quoting Abington School Dist. v. Schempp*, 374 U.S. 203, 241-42 (1963) (Brennan, J., concurring). *See also Everson v. Board of Educ.*, 330 U.S. 1, 23-24 (Jackson, J., dissenting); *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968).

[50] *Grand Rapids Schools Dist. v. Ball*, 473 U.S. at 383; *Committee for Public Educ. v. Nyquist*, 413 U.S. at 772; *Lemon v. Kurtzman*, 403 U.S. at 624; *Illinois ex rel. McCollum v. Board of Educ.*, 333 U.S. at 231 (Frankfurter, J., concurring).

[51] *Grand Rapids School Dist. v. Ball*, 473 U.S. at 383; *Lemon v. Kurtzman*, 403 U.S. at 624.

[52] *Illinois ex rel. McCollum v. Board of Educ.*, 333 U.S. at 231 (Frankfurter, J., concurring) (emphasis added).

Third, the participation of religious groups in social welfare programs lacks the potential for religious indoctrination that sectarian schools possess. The Court has frequently emphasized the unique capacity of "pervasively sectarian" schools for religious indoctrination: these schools are "a powerful vehicle for transmitting [religious] faith to the next generation," [53] whose dominant purpose is "assur[ing] future adherents to a particular faith." [54] The potential for religious indoctrination is greatly enhanced by the "impressionable" age of students and by the fact that primary and secondary education is an ongoing activity that dominates the lives of students.[55]

In contrast, welfare programs often have comparatively limited capacity for religious indoctrination. Social welfare programs typically involve more mature clients whose contacts with the program's operators are much more limited and structured.[56] Similarly, many social services involve trained professionals who are subject to ethical rules and professional standards that inhibit prosyletiz-

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[53] *Lemon v. Kurtzman*, 403 U.S. at 616.

[54] *Walz v. Tax Comm'n* 397 U.S. at 671. *See also Aguilar v. Felton*, 473 U.S. 402, 411-13 (1985); *Lemon v. Kurtzman*, 403 U.S. at 616; *id.* at 628, 635, 641 (Douglas, J., concurring); *id.* at 658 (Brennan, J., concurring); *Meek v. Pittenger*, 421 U.S. at 366; *Board of Educ. v. Allen*, 392 U.S. 236, 245, 247-48 (1968).

[55] *E.g., Roemer v. Maryland Public Works Bd.*, 426 U.S. 736, 752-53 (1976); *Grand Rapids School Dist. v. Ball*, 473 U.S. at 385.

[56] Primary and secondary schooling typically occupies a major part of students' waking hours for most months during a twelve year period. In contrast, social welfare programs (like emergency shelters or medical care) usually involve short-term contacts, both in terms of hours per week and length of treatment. Similarly, primary and secondary education is broad in focus and subject matter, with comparatively few structures or limits. In contrast, many social welfare services (like medical care or drug abuse treatment) are comparatively narrow in their focus and purpose.

ing.[57] Finally, welfare programs typically occur within a community context that restricts religious indoctrination.[58]

As all this illustrates, the social welfare context lacks the uniquely controversial history, the role in fostering national cohesion, and the potential for religious indoctrination that exists in primary and secondary education.[59] These fundamental differences between primary or secondary schooling and social welfare programs make the three-prong *Lemon* test inappropriate in social welfare cases such as this.

Rather than mechanically applying the *Lemon* test, the lower court should have applied this Court's only previous Establishment Clause precedent in the social welfare field.

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[57] Identical considerations have led the Court to distinguish sharply between aid to higher education institutions and aid to primary or secondary schools. *See Tilton v. Richardson*, 403 U.S. 672, 686 (1971).

[58] *Nonestablishment Principle*, at 556 ("The interfaith composition of the staffs and patients of church-related health agencies, for example, makes the welfare aspects of these organizations in the public mind far overshadow their religious attributes."); *Judicial Review Hearings*, at 125-27 ("representative nature of the community action agency . . . represents one safeguard").

[59] Social welfare programs, of course, involve a wide variety of services. Indeed, AFLA itself contemplates a considerable range of social services. 42 U.S.C. 300z-1(a)(4). Some social services bear closer resemblances to primary and secondary education than others. *See, e.g., Church-State*, at 48-56, 57 ("There are . . . instances in which areas of aid to sectarian welfare and education overlap.") For example, counselling resembles education more than transportation programs or soup kitchens do. Nonetheless, while generalizations are difficult, counselling typically involves far more limited, structured and discrete contact with clients than does primary or secondary schooling. Likewise, the professional training and standards of counsellors minimize the potential for religious indoctrination, as does the interfaith character and community representation of many religious social welfare programs.

In *Bradfield v. Roberts*, the Court considered an Establishment Clause challenge to a federal grant of $30,000 to a hospital operated by a congressionally-chartered corporation "composed of members of a monastic order or sisterhood of the Roman Catholic Church." 175 U.S. at 297-298. Although the Roman Catholic Church "exercise[d] great and perhaps controlling influence over the management of the hospital," *id.* at 298, the *Bradfield* Court unanimously upheld Congress's grant.

Two controlling principles governing aid to religious groups for social welfare programs emerge from *Bradfield*: (1) the federal grant was used to fund a secular social welfare service, namely providing "for the care of . . . sick and invalid persons;"[60] and (2) the federal grant was generally available on a nondiscriminatory basis for the benefit of both religious and nonreligious persons.[61] Subsequent decisions of this Court have specifically reaffirmed *Bradfield*,[62] generally interpreting the opinion as reflecting the two foregoing guidelines. Thus, in *Roemer v. Maryland Public Works Board*, Justice Blackmun observed that *Bradfield* "upheld the extension of

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[60] *Bradfield v. Roberts*, 175 U.S. at 297, *quoting* Act of April 8, 1864, ch. 50, § 2, 13 Stat. 43. *See also id.* at 299-300.

[61] *Id.* at 295, 299-300 (emphasizing that the appropriation was contained in a "general appropriation act" that did not require aid to religious groups and that the hospital's "powers are to be exercised in favor of any one seeking the ministrations of that kind of an institution"). The *Bradfield* opinion noted that the Providence Hospital had a congressional charter that made no reference to religious objectives. 175 U.S. at 297. The Court, of course, did not suggest that a "secular" corporate charter would insulate religious groups from Establishment Clause challenges. *Id.* at 298 ("There is no allegation that . . . in its management the hospital has been conducted so as to violate its charter").

[62] *E.g., Lemon v. Kurtzman*, 403 U.S. at 633 (Douglas, J., concurring); *Roemer v. Maryland Public Works Bd.*, 426 U.S. at 746 (plurality opinion of Blackmun, J.); *Hunt v. McNair*, 413 U.S. 734, 743 (1973).

public aid to a corporation which, although composed entirely of members of a Roman Catholic sisterhood . . . was limited by its corporate charter to the *secular purpose of operating a charitable hospital.*" [63] The opinion's discussion of *Bradfield* continued with an explanation that "religious institutions need not be quarantined from public benefits that are *neutrally available to all.*" [64] The two *Bradfield* guidelines are also reflected in the Court's later Establishment Clause decisions outside the social welfare field [65] and in cogent academic commentary.[66]

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[63] 426 U.S. at 746 (plurality opinion of Blackmun, J.) (emphasis added).

[64] *Id.* at 746 (emphasis added). *See Widmar v. Vincent*, 454 U.S. 263 (1981).

[65] *See Tilton v. Richardson*, 403 U.S. at 676-77, 679 (plurality opinion of Burger, C.J.) (noting that "Congress intended the Act to include all colleges . . . regardless of any affiliation with . . . a religious body" and that the Act ensured aid would be devoted to "secular . . . function[s]"); *Hunt v. McNair*, 413 U.S. at 741, 744 ("benefits of the Act are available to all institutions . . . whether or not having a religious affiliation" and assistance was for "secular activities"); *Roemer v. Maryland Public Works Bd.*, 426 U.S. at 740, 759-60 (funds for "any private institution of higher learning" and not for "specifically religious activity").

In *Roemer, Tilton, Hunt* and *Widmar* the Court also applied *Lemon's* so-called "entanglement" analysis. As the absence of any entanglement inquiry in *Bradfield* demonstrates, no such analysis is appropriate in social welfare cases. There are good reasons not to extend *Lemon's* "entanglement" prong to the social welfare context. *Aguilar v. Felton*, 473 U.S. 402, 426-30 (1985) (O'Connor, J., dissenting); *Wallace v. Jaffree*, 472 U.S. 38, 110 (1985) (Rehnquist, J., dissenting); *Committee for Public Educ. v. Nyquist*, 413 U.S. at 813 (White, J., dissenting). *See also* Choper, *The Religion Clauses of the First Amendment: Reconciling the Conflict*, 41 U. Pitt. L. Rev. 673, 681 (1980); Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 Colum. L. Rev. 1373, 1392-94 (1981); *Lee, The Religion Clauses: Problems and Prospects*, 1986 B.Y.U.L. Rev. 337, 340-42. Religious groups and governmental units have long cooperated in providing welfare services without becoming particularly "entangled." *See Judicial Review Hearings*, at 138-45; *Diversity*, at 269 ("a close working relationship has grown up between public welfare officials and religious charitable organizations"). Equally important, the lower court's order would itself produce difficult entanglement issues such as defining whether a group is "religious." *Judicial Review Hearings*, at 46 ("the question of what is a denominational or church-related institution is a very difficult one to resolve"); *Walz v. Tax Comm'n*, 397 U.S. at 698-99 (Harlan, J., concurring) (risk of "entang[ling] government in difficult classifications of what is or is not [a] religious organization").

The *Bradfield* decision, of course, provides no mechanical test for determining when a particular activity is "secular" rather than "religious." As the Court has observed elsewhere, "the line of separation, far from being a 'wall,' is a blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship." [67] Among the circumstances relevant to determining whether a particular activity is "secular" are the purpose of the activity, the extent to which purely secular groups engage in such activities, the similarities of the activity to pure religious worship or indoctrination, the character of the organization engaging in the activity, and the setting where the activity occurs.[68]

B. There is No Basis for a Facial Establishment Clause Challenge to the Act

There is no basis under the two *Bradfield* guidelines for a facial Establishment Clause challenge to AFLA. First, the Act does no more than authorize federal fund-

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[66] *Church-State*, at 44-57, 127-49; *Nonestablishment Principle*, at 554-60; *Disestablishment*, at 405.

[67] *Lemon v. Kurtzman*, 403 U.S. at 614. *See also Roemer v. Maryland Public Works Bd.*, 426 U.S. at 760; *Board of Educ. v. Allen*, 392 U.S. at 242; *Tilton v. Richardson*, 403 U.S. at 677 (plurality opinion of Burger, C.J.).

[68] *E.g., Tilton v. Richardson*, 403 U.S. at 679-82 (plurality opinion of Burger, C.J.).

ing for both nonreligious and religious groups on an entirely neutral basis. The language of AFLA includes religious groups among the organizations entitled to receive federal grants, but contains no requirements or preferences regarding these groups.[69] Similarly, the legislative history of AFLA expressly reaffirms the statute's neutrality.[70] Finally, there is no suggestion that AFLA grantees have discriminated on the basis of religion in providing services.

Second, the Act plainly satisfies *Bradfield*'s requirement that governmental funding be available for secular activities. Many of the services provided for by AFLA—like postnatal medical care and transportation—are indisputably secular. These services are routinely provided by wholly nonreligious organizations and have no connection to religious doctrine or practices. Moreover, these services could readily be provided in settings with few religious overtones by groups with minimal religious affiliation.[71] Given these obviously constitutional possibil-

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[69] The Act is thus identical in substance and effect to the statutes upheld in *Roemer*, *Tilton*, and *Hunt*. *Roemer v. Maryland Public Works Bd.*, 426 U.S. at 740-44 (state law providing funding for "any private institution of higher learning" but not for "sectarian purposes"); *Tilton v. Richardson*, 403 U.S. at 676-77 ("Congress intended the Act to include all colleges and universities regardless of any affiliation with . . . a religious body"); *Hunt v. McNair*, 413 U.S. at 736-39 (aid to "assist institutions for higher education" but not for facilities used for sectarian instruction or worship).

[70] "Religious affiliation is not a criterion for selection as a grantee . . . but any such grants . . . would be a simple recognition that nonprofit religious organizations have a role to play in the provision of services to adolescents." S. Rep. No. 161, 97th Cong., 1st Sess. 16 (1981).

[71] Even in the context of "pervasively sectarian" parochial schools, public funding for "[b]us transportation, school lunches, public health services, and secular textbooks supplied in common to all students were not thought to offend the Establishment Clause." *Lemon v. Kurtzman*, 403 U.S. at 616-17.

ities for AFLA funding, appellees clearly cannot satisfy the well-settled rule that a facial challenge "must establish that no set of circumstances exists under which the Act would be valid." [72]

The district court ignored the Act's provision of funding for these obviously secular services, narrowly focusing instead on AFLA's funding for counselling programs. The court devoted particular attention to the Act's prohibition against grants for projects providing abortion: "[i]t is a fundamental tenet of many religions that premarital sex and abortion are wrong, even sinful . . . . [B]y contemplating the provision of aid to organizations affiliated with these religions . . . AFLA contemplates subsidizing a fundamental religious mission of these organizations." [73]

Contrary to the district court's suggestion, the counselling contemplated by AFLA clearly *can* be provided in circumstances in which such counselling would constitute a "secular" activity. Congress's purposes in funding such counselling—coping with the severe economic, social and health problems caused by premarital teenage pregnancies—were indisputably secular.[74] Moreover, there is nothing inherently sectarian about counselling services, which can readily be provided without reference to religious doctrine. Indeed, countless therapists with absolutely no religious affiliations provide such services on a daily basis all around the country.[75]

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[72] *United States v. Salerno*, 107 S. Ct. 2095, 2100 (1987); *Schall v. Martin*, 467 U.S. 253, 268-69 n. 18 (1984); *New York v. Ferber*, 458 U.S. 747 (1982); *McGowan v. Maryland*, 366 U.S. 420, 429-30 (1961).

[73] *Kendrick v. Bowen*, 657 F. Supp. at 1563.

[74] See 42 U.S.C. 300z(a)(5) (1982) & pp. 26-27.

[75] *See, e.g., Bradfield v. Roberts*, 175 U.S. 291 (1899); *Walz v. Tax Comm'n*, 397 U.S. at 693 ("The means churches use to carry on their public service activities are not 'essentially religious' in

Nor is the secular character of the counselling services that could be provided under AFLA affected by the fact that the Act contemplates that grantees may encourage sexual restraint and adoption. The Court has frequently remarked that "[i]t is well settled . . . that a regulation does not violate the Establishment Clause merely because it 'happens to coincide or harmonize with the tenets of some or all religions.' "[76] On the contrary, harmonization of government policy with religious precepts is permissible so long as there is a "neutral, secular basis" for AFLA's treatment of sexual restraint and adoption.[77] Congress's findings make it clear that AFLA's encouragement of adoption and sexual restraint among unwed adolescents has a "neutral, secular basis" of the highest order—the protection of the public health.[78]

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nature. They are the same means used by any purely secular organization—money, human time and skills, physical facilities.") (Brennan, J., concurring). For example, a religious service organization with minimal connections to its sponsor might provide counselling with no sectarian overtones in a secular surrounding. There would be no basis for characterizing this sort of counselling as "religious activity."

[76] *Bob Jones Univ. v. United States*, 461 U.S. 574, 604 n.30 (1983) (quoting *McGowan v. Maryland*, 366 U.S. 420, 442 (1961)); *Gillette v. United States*, 401 U.S. 437, 452 (1971).

[77] *Id.* at 452; *McGowan v. Maryland*, 366 U.S. at 442.

[78] Congress specifically made detailed factual findings about the "severe adverse health, social, and economic consequences" of premarital pregnancy and childbirth. In particular, Congress noted a number of serious health and social risks faced by unmarried adolescent mothers and their children: a "higher percentage of pregnancy and childbirth complications"; a "higher frequency of developmental disabilities"; "higher infant mortality and morbidity"; and "higher risks of unemployment and welfare dependency." *See* 42 U.S.C. 300z(a)(5) (1982).

Indeed, the Court squarely held in *Harris v. McRae*, that the fact that a prohibition of funding for abortions "may coincide with the religious tenets of the Roman Catholic Church does not, without more, contravene the Establishment Clause." 448 U.S. 297, 319-

The extraordinary breadth of the district court's rationale demonstrates the error in holding AFLA facially unconstitutional. According to the lower court, the Act is unconstitutional because governmental funding of counselling about premarital sex and adoption would "subsidiz[e] a fundamental religious mission of [religious] organizations." 657 F. Supp. at 1563. This logic condemns literally every social welfare service provided by religious groups. Feeding the hungry, sheltering the homeless, tending the sick, and counselling the bereaved are all "fundamental religious mission[s]" of religious groups. If applied consistently, the district court's sweeping rationale would forbid government aid for all these services, thereby threatening countless welfare programs all around the Nation. Nothing in the Establishment Clause requires a result that is so harsh and so inconsistent with our history.[79]

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20 (1980). *See also Marsh v. Chambers*, 463 U.S. 783, 792 (1983); *Lynch v. Donnelly*, 465 U.S. 668, 682 (1984). The Court in *McRae* concluded flatly that " 'traditionalist' values towards abortion" provided a valid basis for prohibiting the funding of abortions. 448 U.S. at 319. The extensive congressional findings regarding the medical and social effects of teenage pregnancies make this case all the easier.

[79] The district court's conclusion ignored Congress's consideration of possible Establishment Clause defects in AFLA, and its conclusion that no such defects existed. *See* S. Rep. No. 161, 97th Cong., 1st Sess. 15-16 (1981) ("promoting the involvement of religious organizations . . . is neither inappropriate or illegal"); S. Rep. No. 496, 98th Cong., 2d Sess. 9-10 (1984). It is well-settled that substantial deference should be accorded the considered views of coordinate branches of Government. *Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305 (1985); *Marsh v. Chambers*, 463 U.S. at 791, 793-94; *Mueller v. Allen*, 463 U.S. at 396. Judicial deference to the conclusions of coordinate branches of Government is particularly appropriate where, as here, a facial challenge to an Act of Congress turns upon broad questions of legislative fact.

C. The District Court Erred in Striking Down the Act on "As-Applied" Grounds

The district court's conclusion that AFLA was unconstitutional "as-applied" is also seriously flawed.[80] The district court rested its decision on conclusory generalizations about "some" or "several" AFLA grantees and isolated aspects of a few projects. This broad-brush approach falls far short of the standards that must be satisfied to invalidate an Act of Congress on Establishment Clause grounds.[81]

There could be circumstances in which AFLA grantees used funds for counselling that was so pervaded with religious imagery, doctrine and purpose that otherwise secular activities would be converted into religious worship or indoctrination. Such conduct would, of course, violate AFLA itself, quite apart from the Establishment Clause.[82] There appears, however, to be very little in the lower court's opinion supporting a conclusion that AFLA funds were improperly used for religious activities.[83] The fact that AFLA grantees had religious affiliations does

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[80] The district court nowhere suggested that AFLA grants were in fact not awarded in a neutral, nondiscriminatory manner. Indeed, only 25% of the AFLA grantees have been religiously affiliated (Decl. of Jo Ann Gasper, May 12, 1987). Accordingly, the first of the *Bradfield* guidelines is satisfied.

[81] *Lemon v. Kurtzman*, 403 U.S. at 614; *Roemer v. Maryland Public Works Bd.*, 426 U.S. at 755-61; *Wolman v. Walter*, 433 U.S. 229, 236-54 (1977).

[82] *See* S. Rep. No. 496, 98th Cong., 2d Sess. 10 (1984). *See also Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 346 (1936) (Brandeis, J., concurring).

[83] It is, as shown earlier, irrelevant that some religious groups received funds for counselling about issues coinciding with their religious tenets. *See* p. 26 *supra*. Similarly, the purposes of the AFLA grants were entirely secular and all of the challenged counselling services could readily have been performed by wholly secular entities. *See* pp. 24-25 *supra*.

not, of course, render the grantees' activity religious.[84] Similarly, the presence of religious symbols in the places that AFLA counselling occurred is of minimal importance.[85] Finally, a balanced treatment of both "theological and secular views on secular conduct," even using "explicitly religious materials," provides no basis for concluding that religious indoctrination has occurred.[86]

Because the district court made no adequate findings regarding specific programs, because it did not consider whether the activities in such programs were prohibited by AFLA, and because the relief it ordered was directed broadly against the entire AFLA program, the district court's "as-applied" holding should be reversed.

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[84] 657 F. Supp. at 1564-65. In *Bradfield v. Roberts*, the hospital receiving federal aid was "composed of members of a monastic order" and the Roman Catholic Church "exercise[d] great and perhaps controlling influence over the management of the Hospital." 175 U.S. at 297-98. Under *Bradfield* the mere fact that a religiously controlled institution provides services does not mean that those services constitute religious activity. Indeed, a group's religious affiliation is a relatively minor factor in determining whether its activity is secular.

[85] 657 F. Supp. at 156. *See Lynch v. Donnelly*, 465 U.S. at 681-83; *Roemer v. Maryland Public Works Bd.*, 426 U.S. at 756.

[86] 657 F. Supp. at 1565. *See Roemer v. Maryland Public Works Bd.*, 426 U.S. at 756 ("Mandatory religious or theology courses are taught . . . primarily by Roman Catholic clerics, but these only supplement a curriculum covering 'the spectrum of a liberal arts program' ").

CONCLUSION

For these reasons, the judgment of the court below should be reversed.

Respectfully submitted,

Of Counsel:
JAMES S. CAMPBELL
WILMER, CUTLER & PICKERING
2445 M Street, N.W.
Washington, D.C. 20037

GARY B. BORN
Counsel of Record
R. SCOTT KILGORE
WILMER, CUTLER & PICKERING *
2445 M Street, N.W.
Washington, D.C. 20037
(202) 663-6000

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* Robert Swanson assisted in the preparation of this Brief.

APPENDICES

APPENDIX A

States in Which Language of State Constitution Permits Aid to Religious Groups for Social Welfare Purposes

1. *Alabama*—Ala. Const. Art. IV, § 73, permits aid to private charitable or educational organizations on two-thirds vote of legislature; Ala. Const. Art. XIV, § 263, only forbids use of public school funds for "sectarian or denominational school[s]." See *Alabama Education Ass'n v. James*, 373 So.2d 1076 (Ala. 1979).

2. *Alaska*—Alaska Const. Art. VII, § 1, forbids only payment of public funds to any "religious or other private educational institution." *See Lien v. City of Ketchikan*, 383 P.2d 721 (Alas. 1963); 1959 Op. Att'y Gen., No. 19 (Alas. 1959).

3. *Arkansas*—Ark. Const. Art. XIV, § 2, only requires use of public school fund for dedicated purposes. *Cf. Cortez v. Independence County*, 698 S.W.2d 291 (Ark. 1985).

4. *California*—Cal. Const. Art. IX, § 8, and Art. XVI, § 3, prohibit only public funding of sectarian schools, and permit aid for defined social welfare purposes. *See* Cal. Op. Att'y Gen. No. 82-509 (1983).

5. *Connecticut*—Conn. Const. Art. VIII, only prohibits use of public school fund for purposes other than public schooling.

6. *Delaware*—Del. Const. Art. X, § 3, only prohibits using educational funds for any "sectarian, church or denominational school."

7. *Hawaii*—Haw. Const. Art. X, § 1, only prohibits using public funds for "any sectarian or private educational institution."

8. *Idaho*—Idaho Const. Art. IX, § 5, permits funding for religious health facilities. *See Board of County Commissioners of Twin Falls County v. Idaho Health Facilities Auth.*, 531 P.2d 588 (Idaho 1974).

9. *Iowa*—Iowa Const. Art. IX, § 2, requires University funds to be used solely for State University.

10. *Kansas*—Kan. Const. Art. VI, § 6(c) and Kan. Const. Art. 6, § 8 (1861), only forbid "religious sect or sects" from controlling "public education funds." *See* Kan. Op. Att'y Gen. No. 78-392 (1978).

11. *Kentucky*—Ky. Const. § 189, only forbids using "educational" funds for "any church, sectarian or denominational school." *See Abernathy v. City of Irvine*, 355 S.W.2d 159 (Ky. 1961), *cert. denied*, 371 U.S. 831 (1962); *Kentucky Building Comm'n v. Effron*, 220 S.W.2d 836 (Ky. Ct. Apps. 1949).

12. *Louisiana*—La. Const. Art. I, § 8 and La. Const. Art. IV, § 8 (1921) and La. Const. Art. 51 (1879), permitted local (but not state) aid to religious groups for social welfare purposes. *See State ex rel. Orr v. City of New Orleans*, 24 So. 666 (La. 1898); La. Op. Att'y Gen. 837 (1938-40).

13. *Maine*—Maine Const. Art. I, § 3. *See Squires v. Augusta*, 153 A.2d 80 (Me. 1959).

14. *Minnesota*—Minn. Const. Art. XIII, § 2, only prohibits public funding of "schools wherein the distinctive doctrines, creeds or tenets of any particular Christian or other religious sect are promulgated or taught."

15. *Mississippi*—Miss. Const. § 208 only forbids "religious or other sect or sects" from controlling public "educational funds" and public funding of any "sectarian school." *See Craig v. Mercy Hospital—Street Memorial*, 45 So.2d 809 (Miss. 1950) and 47 So.2d

867 (Miss. 1950); *In re: Validation of $15,000,000 Hospital Revenue Bonds*, 361 So.2d 44 (Miss. 1978).

16. *Nebraska*—Neb. Const. Art. VII, § 11, only forbids public funding of any private "school or institution of learning," except for handicapped children receiving "nonsectarian" instruction. *See* Neb. Op. Att'y Gen. No. 103 (1981) (dicta).

17. *New Hampshire*—N.H. Const. Art. 83, only forbids public funding of "schools or institutions of any religious sect or denomination." *See Opinion of the Justices*, 113 A.2d 114 (N.H. 1955).

18. *New Mexico*—N.M. Const. Art. IV, § 31 and Art. IX, § 14 and Art. XII, § 3, only forbid public funding of "any sectarian, denominational or private school, college or university" and authorizes local and state assistance for defined charitable activities.

19. *New York*—N.Y. Const. Art. XI and Art. XVIII, § 3, only forbid public funding of "any school or institution of learning wholly or in part under the control or direction of any religious denomination," but permit local public aid for social welfare purposes. *See Sargent v. Board of Education*, 69 N.E. 722 (N.Y. 1904); *Shepherd's Fold of Protestant Church v. New York*, 96 N.Y. 137 (1884).

20. *North Carolina*—N.C. Const. Art. IX, § 6 and § 7, only require use of state and county school funds for "public schools." *See* 43 N.C.A.G. 189 (1973).

21. *North Dakota*—N.D. Const. Art. VIII, § 5 and Art. XII, § 185, only forbid use of public school funds for "any sectarian school" and specifically permit funding for "reasonable support of the poor."

22. *Ohio*—Ohio Const. Art. VI, § 2, only forbids any "religious or other sect, or sects," from controlling "the school funds of this state." *See Lazarus v.*

Board of Commissioners, 217 N.E.2d 883 (Ohio 1966).

23. *Pennsylvania*—Pa. Const. Art. III, § 17 and § 18 and Art. X, § 2 (1874), permit appropriations to private charitable and educational institutions, including "denominational and sectarian" institutions, upon two-thirds vote or for specified social welfare purposes. *See Shade v. Allegheny County Institution Dist.*, 126 A.2d 911 (Pa. 1956). *But see Collins v. Martin*, 139 A. 122 (Pa. 1927); *Collins v. Kephart*, 117 A. 440 (Pa. 1921).

24. *Rhode Island*—R.I. Const. Art. XII, § 2, only requires use of public schools funds for dedicated purposes.

25. *Tennessee*—Tenn. Const. Art. I, § 3 and Art. XI, § 12, do not forbid public aid to religious groups for social welfare purposes. *See* Tenn. Op. Att'y Gen. 80-32 (1980).

26. *Utah*—Utah Const. Art. II, § 4 and Art. X, § 13, only require public schools to be free from "sectarian control" and forbid appropriations to any "school, seminary, academy, college, university or other institution, controlled in whole, or in part, by any church, sect or denomination whatever." *See Manning v. Sevier County*, 517 P.2d 549 (Utah 1973); *Stone v. Salt Lake City*, 356 P.2d 631 (Utah 1960), *cert. denied*, 365 U.S. 860 (1961).

27. *Vermont*—Vt. Const. Art. 3, contains no prohibition on public funding of religious groups for social welfare purposes. *See Vermont Educational Buildings Financing Agency v. Mann*, 247 A.2d 68 (Vt. 1968).

28. *Virginia*—Va. Const. Art. IV, § 16, permits General Assembly to authorize "counties, cities, or towns" to make appropriations to "any charitable institution or association," while forbidding state funding of

"church[es] and sectarian societ[ies]." *See* Va. Code § 15.1-24, § 15.1-25 and § 15.1-26 (permitting appropriations for YMCA and YWCA; permitting "contracts with any sectarian institution for the care of indigent, sick or injured persons"; and forbidding other appropriations to sectarian societies).

29. *West Virginia*—W. Va. Const. Art. III, § 15 and Art. XII, § 2 and § 5, only forbid aid for "the erection or repair of any house for public worship, or for the support of any church or ministry." *See* 57 W. Va. Op. Att'y Gen. 201 (1977).

APPENDIX B

States in Which State Courts or Attorneys General Permit Aid to Religious Groups for Social Welfare Purposes

1. *Arizona*—Ariz. Const. Art. II, § 12; Art. IX, § 10; Art. XI, § 8. *See Community Council v. Jordan*, 432 P.2d 460 (Ariz. 1967); Op. Att'y. Gen. No. 187-033 (Ariz.)

2. *Colorado*—Colo. Const. Art. V, § 34; Art. IX, § 7. *See Americans United for Separation of Church and State Fund, Inc. v. State*, 648 P.2d 1072 (Colo. 1982).

3. *Florida*—Fla. Const. Art. I, § 3 & § 6. *See Fenske v. Coddington*, 57 So.2d 452 (Fla. 1952); *Nohrr v. Brevard County Educational Facilities Auth.*, 247 So.2d 304 (Fla. 1971); Op. Att'y. Gen. 284 (Fla. 1939).

4. *Georgia*—Ga. Const. Art. I, § 11, ¶ VII. *See Bradfield v. Hospital Authority of Muscogee County*, 176 S.E.2d 92 (Ga. 1970). *But see Bennet v. City of La Grange*, 112 S.E. 482 (Ga. 1922); *Savannah v. Richter*, 127 S.E. 148 (Ga. 1925).

5. *Illinois*—Ill. Const. Art. X, § 3. *See St. Hedwig's School v. Cook County*, 124 N.E. 629 (Ill. 1919); *Dunn v. Chicago Industrial School*, 117 N.E. 735 (Ill. 1917), *overruling Cook County v. Chicago Industrial School*, 18 N.E. 183 (Ill. 1888).

6. *Maryland*—Md. Const. Art. 36 and Art. 38. *See St. Mary's Industrial School for Boys v. Brown*, 45 Md. 310 (1876); *Finan v. Mayor & City Council of Cumberland*, 141 A. 269 (Md. 1928); *Truitt v. Board of Public Works*, 221 A.2d 370 (Md. 1966).

7. *Massachusetts*—Mass. Const. Art. XLVI, § 2. *See* Op. Att'y Gen. 132 (1942).

8. *Michigan*—Mich. Const. Art. I, § 4. *Ellis v. City of Grand Rapids*, 257 F. Supp. 564 (W.D. Mich. 1966).

9. *Missouri*—Mo. Const. Art. I, § 7. *See Menorah Medical Center v. Health and Educational Facilities Authority*, 584 S.W.2d 73 (Mo. 1979) (en banc).

10. *Montana*—Mont. Const. Art. V, § 11 and Art. X, § 6. *See* Mont. Op. Att'y Gen. No. 165 (1978).

11. *Nevada*—Nev. Const. Art. XI, § 10. *See* Att'y Gen. Op. B-40 (2-11-1941). *But see State ex rel. Nevada Orphan Asylum v. Hallock*, 16 Nev. 373 (1882).

12. *New Jersey*—N.J. Const. Art. VIII, § III, ¶ 3. *See St. John's Evangelical Lutheran Church v. City of Hoboken*, 479 A.2d 935 (N.J. 1983); *Makar v. St. Nicholas Ruthenian Greek Catholic Church*, 187 A.2d 353 (N.J. 1963).

13. *Oklahoma*—Okla. Const. Art. I, § 5 and Art. II, § 5. *See Murrow Indian Orphans Home v. Childers*, 171 P.2d 600 (Okla. 1946); *State v. Williamson*, 347 P.2d 204 (Okla. 1959); *Tulsa Area Hospital Council Inc. v. Oral Roberts University*, 626 P.2d 316 (Okla. 1981).

14. *Oregon*—Ore. Const. Art. I, § 5. *See* Att'y Gen. Op. 1956-58, p. 257; Att'y Gen. Op. 1966-68, p. 351; Att'y Gen. Op. Vol. 44, No. 8148 (1982); Att'y Gen. Op. No. OP 5726 (1985).

15. *South Carolina*—S.C. Const. Art. XI (1895) and S.C. Const. Arts. X, § 11 and XI, § 4. *See* S.C. Op. Att'y Gen. No. 3831 (1974).

16. *Washington*—Wash. Const. Art. I, § 11 and Art. IX, § 4. *See Washington Health Care Facilities Authority v. Spellman*, 633 P.2d 866 (Wash. 1981).

17. *Wisconsin*—Wis. Const. Art. I, § 18 and Art. X, § 3 prohibit appropriations for "religious societies, or religious or theological seminaries." *See State ex. rel. Wisconsin Health Facilities Authority v. Lindner*, 280 N.W.2d 773 (Wis. 1979); *State ex. rel. Warren v. Nusbaum*, 219 N.W.2d 577 (Wis. 1974); Op. Att'y Gen. 53-87 (1987); 21 Op. Att'y Gen. 727 (1932).

APPENDIX C

States in Which State Constitution Apparently Forbids Direct Government Aid to Religious Groups for Social Welfare Purposes

1. *Indiana*—Ind. Const. Art. VIII, § 7. *See* Op. Att'y Gen. 356 (1934).
2. *South Dakota*—S.D. Const. Art. VI, § 3 and Art. VIII, § 16. *See Synod of Dakota v. State*, 50 N.W. 632 (S.D. 1891).
3. *Texas*—Tex. Const. Art. I, § 7 and Art. VII, § 5. *See Church v. Bullock*, 109 S.W. 115 (Tex. 1908); Op. Att'y Gen. No. M-1255 (1972).
4. *Wyoming*—Wy. Const. Art. 1, § 19 and Art. VIII, § 4 and § 12.

Supreme Court, U.S.
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No. 87-431

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

OTIS R. BOWEN, Secretary of Health and Human Services,

Appellant,

v.

CHAN KENDRICK, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF OF THE INSTITUTE FOR YOUTH ADVOCACY, *AMICUS CURIAE*, IN SUPPORT OF APPELLANT

GREGORY A. LOKEN
Institute for Youth Advocacy
Covenant House
460 West 41st Street
New York, New York 10036
(212) 613-0349

Counsel for Amicus Curiae

Question Presented

Does it violate the First Amendment for the federal government to respond to the graphic harms of adolescent sexual activity and pregnancy by seeking innovative help, such as education and counselling for high-risk teenagers, from a broad spectrum of private charitable organizations, including some with religious affiliation?

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF *AMICUS CURIAE*

The Institute for Youth Advocacy, Covenant House, respectfully submits this brief *amicus curiae* in support of Appellant in this case. The written consents of the parties have been obtained and submitted to the Clerk.

Statement of Interest

The Institute for Youth Advocacy is a part of Covenant House, the largest private organization in the country serving homeless and runaway children. Founded officially in 1972 by Fr. Bruce Ritter, a Franciscan priest, Covenant House annually provides crisis and long-term help to over 15,000 children and teenagers in New York City, Houston, Toronto, Fort Lauderdale, New Orleans, Guatemala, Panama, and Honduras. Separated at least temporarily,

but often permanently, from their families, these children and adolescents are forced into a desperate struggle for survival on the street, pushed into petty crime, prostitution, panhandling, and despair. The crisis shelters of the agency operate on an "open-intake" basis: no child or teenager is ever turned away on the first visit, and only serious misconduct or refusal to make use of proffered services limits repeat visits.

Nearly all the adolescents served by Covenant House in its American programs are sexually active. Many of the girls arrive at "intake" pregnant or with a child in tow: in New York alone over 800 teenage mothers entered crisis shelter in 1987, bringing with them some 1000 infants and toddlers. Special mother-child units in the crisis shelters, and now a special longer-term program called Rights of Passage, attempt to meet the needs of these young women and their children for health care, legal assistance, counselling, and training in parenting and "survival skills". Yet there are few solid options for them: by virtue of their age and immaturity most young mothers, and young fathers, at Covenant House require months or even years of help before they reach self-sufficiency, and their children often spend extensive periods in foster care.

In October of 1984 Covenant House was awarded a grant from the U.S. Department of Health and Human Services under the Adolescent Family Life Act, 42 U.S.C. (& Supp. III) § 300z *et seq.* (the "Act"), to develop innovative programs to assist teenage mothers and fathers in its New York, Houston and Fort Lauderdale programs. *See* Jt. App. 639-641 (Affidavit of Rev. Ritter). The grants averaged approximately $375,000 for each of the first two years, then have declined each year as scheduled, and will end after five years. Some 36 staff members, including health and social-work professionals, have served to date

over 300 adolescents in the Covenant House programs sponsored under the Act. These funded programs have been independently assessed each year by an outside, university-affiliated evaluator, and have demonstrated substantial success in reducing pregnancy rates among the population served, while providing useful training in many areas beyond sexuality and parenting, including health, nutrition, and job-finding. No religious proselytizing is permitted in any of these programs, and they are provided in a religiously neutral setting.

Covenant House as an organization, however, has ties to the Roman Catholic Church, both in having as its president and founder a Catholic priest, and its listing as a "Catholic charity" in *The Official Catholic Directory.* The agency has, however, its own tax exemption under Section 501(c)(3) of the Internal Revenue Code, and is governed by a non-sectarian board of directors, with no right of interference held by any religious authority. Its support comes from individual contributions from the general public (80%), corporations and foundations (10%-15%), and government sources (5%-10%).

This case affects Covenant House in a number of direct and substantial ways. If the decision appealed from is affirmed, it is possible that Covenant House will be deemed ineligible to participate in any activities under the Act, and will lose funding for the programs currently in operation. Continuation of those programs without federal support would be highly problematic, and the young mothers and fathers they serve would lose their benefits under the Act. Finally, Covenant House may be unfairly stigmatized as a "religious organization" and forced to a heavy burden of proof in applying for government assistance in other parts of its programs for vulnerable children.

Covenant House brings to the case not only a strong interest in its outcome, but a perspective somewhat different from that of any of its current parties. As a provider of services under the Act, Covenant House has experience in its administration and its philosophy. More crucially, as a longtime national leader in innovative services for homeless and runaway teenagers, Covenant House has faced the crucible of adolescent sexuality and pregnancy every hour of its existence. Because that crucible is so real and so tragic for hundreds of thousands of children and adolescents, Covenant House submits this brief *amicus curiae* in support of Appellant and in support of the validity of the challenged Act.

Statement of the Case

Amicus accepts and adopts the Statement of the Case in the Jurisdictional Statement of the Appellant Secretary of Health and Human Services. U.S. J.S. 2-8.

Summary of the Argument

Premature involvement of adolescents in sexual activity and pregnancy is a national problem of alarming dimensions and with devastating results for many teenagers. Adoption of the Adolescent Family Life Act, 42 U.S.C. (& Supp. III) § 300z *et seq.* (the "Act"), to fund innovative approaches toward reducing premarital intercourse and pregnancy was an important and appropriate response in view of the public costs, and private suffering, such sexual activity inflicts. Inclusion of "religious organizations" as among the broad range of private groups and organizations eligible to participate in the Act's programs was necessary to make them fully effective and comprehensive.

Such inclusion does not conflict with the Establishment Clause of the First Amendment. Only grave secular interests are furthered in the Act's structure and philosophy; "religion" and "religious doctrine", properly understood, are in no way advanced or hindered by the Act, even if its programs are carried out by religio ly affiliated organizations. The Act also threatens no "entanglement" of government and religion, for it is structured along lines similar to longstanding, clearly valid partnerships of government with private organizations (including religious organizations) to aid vulnerable children, with special protections against the need for excessive government "monitoring" of programs. The compelling interests of children and teenagers in this area, moreover, counsel a careful weighing of the interests at stake; the balance will clearly fall on the side of the Act's validity.

If the Act is found partially unconstitutional, however, the vague, overbroad description of "religious organizations" in the District Court opinion should be modified to allow participation in the Act's programs by religiously affiliated organizations that are not "pervasively religious" in character. The lower court's unwillingness to consider the nuances of religious affiliation is symptomatic of its generally mechanical approach to the delicate human and constitutional interests at stake in this important case. The scarred and sometimes broken children whom the Act seeks to help merit a more insightful reading of the First Amendment.

Introduction

> The first time, it was like totally out of the blue. You don't . . . say, "Well, I'm going to his house, and he's probably going to get to bed with me, so I better make sure I'm prepared." I mean, you don't know it's coming, so how are you to be prepared?
>
> New York [girl] aged 16-17[1]

Every year, "totally out of the blue", some 270,000 unmarried girls under the age of 20 give birth to a child.[2] Half again that many teenaged girls—401,000 in 1984—undergo abortions, while another 130,000 have miscarriages.[3] As little "prepared" as they are for first sexual intercourse, they are even less ready to cope with its consequences. Addressing the plight of these girls, and the plight of the children they bear, is at the very least "high on the social agenda";[4] more likely it represents one of the central public policy challenges of this half century.

The Adolescent Family Life Act (the "Act"), 42 U.S.C. (& Supp. III) §§ 300z-300z-10, is the most recent, and most remarkable response by Congress to that challenge. For Congress sought explicitly in the Act to encourage "innovative programs that have as their goal the overall reduction in the high rate of premarital adolescent [sexual] relations."[5] While certainly an obvious strategy to reduce

[1] E. Kisker, *Teenagers Talk About Sex, Pregnancy and Contraception*, 17 Family Planning Perspectives 83 (1985).

[2] Nat'l Research Council, I *Risking the Future: Adolescent Sexuality, Pregnancy, and Childbearing* 65 (1987) (hereinafter "Risking the Future").

[3] *Id.* at 54.

[4] E. Jones *et al.*, *Teenage Pregnancy in Industrialized Countries* 240 (1986).

[5] S. Rep. No. 496, 98th Cong., 2d Sess. 5 (1984).

adolescent pregnancy rates, it was also one that had gone almost completely neglected by government and private professionals.[6] Such a strategy is widely deemed "appropriate" for teenagers,[7] but it has been so little utilized that research on its implementation and effectiveness is only beginning to emerge.[8]

And, indeed, it may never emerge. For in a tragic misapplication of the Establishment Clause, the District Court in this case has declared invalid one of the central provisions of the Act—that its programs encompass, wherever "appropriate in the provision of services," *all* those segments of the community that may shape the decision to initiate sexual intercourse, including the family, "voluntary associations," and "religious and charitable organizations." 42 U.S.C. § 300z-5(a)(21). In a leaden, unnuanced reading of the Establishment Clause "test" first announced in *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971), the lower court felt constrained to find that inclusion of "religious organizations" among potential grantees and participants under the Act caused it to have "the primary effect of advancing religion" (U.S. J.S. App. 21a, 38a) and to "[foster] excessive entanglement between government and religion." (*Id.* at 42a.)

Amicus pretends to bring to this case no special insight into the complex jurisprudence of the religion clauses, nor does *amicus* have special understanding of the general application of the Act.[9] What Covenant House and programs

[6] *Id.*

[7] I *Risking the Future*, *supra* note 2, at 269.

[8] *See* Hofferth, *The Effects of Programs and Policies on Adolescent Pregnancy and Childbearing*, in II *Risking the Future*, *supra* note 2, at 207, 208-211.

[9] Thus *amicus* takes no position regarding the asserted misuse of government funds explicitly to promote sectarian doctrine, U.S.

(footnote continued on following page)

like it *can* understand, however, is that the aims of the Act are of the highest public importance, that its structure in no way promotes "religion", and that the Act threatens no salacious contact between Church and State. Even more crucially, however, the secular aims of the Act can be accomplished *only* by involving *all* persons and groups that affect a teenager's thinking about beginning sex, including "religious organizations"—a factor not considered by the lower court but strongly implied by the *Lemon* test. Finally, the District Court's definition of "religious organizations" is so stunningly overbroad that such programs as Covenant House—with only the most attenuated ties to a church, and not the slightest history of proselytizing the youth it serves—are threatened with loss of funding under the Act. (U.S. J.S. App. 35a.) It is a decision muddled in conception and pernicious in result.

I.

Encouraging Teenagers to Avoid Premarital Sex and Pregnancy Is a Secular, Governmental Responsibility of the Highest Order.

For the hundreds of thousands of unmarried adolescent girls who become pregnant each year, for the children they carry to term, and for the teenaged boys who face premature fatherhood, this is no academic dispute. The decision teenagers make to begin sex often threatens them with a desperate change in personal circumstances, as it threatens society with crushing long-term burdens. No judgment on the constitutionality of the Act can fairly be made without

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(footnote continued from previous page)

J.S. App. 32a-38a; nor is *amicus* in a position, except with regard to Covenant House's own programs under the Act, to dispute the District Court's conclusion that such misuse constitutes an unconstitutional *application* of the Act.

an understanding of the gravity of its central aims, and the real lives it seeks to benefit.

Between 1970 and 1984 birth rates for unmarried girls aged 15 to 19 climbed 34.8 percent,[10] despite clear indications of better contraceptive use by sexually active teenagers,[11] and, of course, extraordinary increases in abortion.[12] There is one, and only one, explanation for this jump, and for the parallel rise in premarital pregnancies among teenagers: a steep climb in the number of adolescents who are sexually active.[13] Thus an 18-year-old girl in 1982 was 54 percent more likely to have had premarital sexual intercourse than an 18-year-old girl in 1971,[14] provoking one scholar to announce that "there was indeed a sexual revolution in the late 1960s and 1970s."[15]

And it was a revolution with grim consequences. For teenage mothers it has meant significantly reduced educational attainment,[16] and "serious negative implications for

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[10] I *Risking the Future*, *supra* note 2, at 66. For white girls in that age group out-of-wedlock birth rates climbed a staggering 74.3 percent. *Id.*

[11] S. Hofferth, *Contraceptive Decision-Making among Adolescents*, in II *Risking the Future*, *supra* note 2, at 56, 66; Jones, *supra* note 4, at 50; M. Zelnik *et al.*, *Sex and Pregnancy in Adolescence* 126 (1981).

[12] From 1971 to 1982 the number of legal abortions obtained by girls aged 15 to 19 rose from 150,000 to 443,000, accounting for the end of 40 percent of all teenage pregnancies. I *Risking the Future*, *supra* note 2, at 58.

[13] Hofferth *et al.*, *Premarital Sexual Activity among U.S. Teenage Women Over the Past Three Decades*, 19 Family Planning Perspectives 46 (1987).

[14] *Id.* at 48 (57.8% of such girls sexually experienced in 1982 as against 36.9% in 1971).

[15] *Id.* at 53.

[16] *See* Mott & Marsiglio, *Early Childbearing and Completion of High School*, 17 Family Planning Perspectives 234 (1985); I *Risking the Future*, *supra* note 2, at 124-28.

long-term marital stability and . . . economic well-being," [17] including drastically lower employment prospects.[18] For their children it has meant sharing that instability and poverty, along with an elevated risk of low birth weight and postneonatal death.[19] For American taxpayers it has meant shouldering a burden of over $16 billion in public assistance paid each year to women who first gave birth as teenagers,[20] and the responsibility to provide intensive services tailored to the need of adolescent mothers for adult guidance.[21]

Single teenaged parents and their children are the chief victims of the adolescent "sexual revolution," but hardly the only ones. Between 1963 and 1979 the rate of reported gonorrhea among 15- to 19-year-old females rose 553 percent; at its current rate that sexually transmitted disease alone will cause U.S. adolescents 5000 cases of chronic pelvic pain, 1600 cases of infertility, and 950 ectopic pregnancies each year.[22] Chlymydia, pelvic inflammatory dis-

[17] I *Risking the Future*, *supra* note 2, at 129.

[18] *Id.* at 130-32. Differences in employment rates between young mothers and their peers without children, as much as 40 percent over 5 years, do diminish somewhat in the long run. *Id.*

[19] D. Strobino, *The Health and Medical Consequences of Adolescent Sexuality and Pregnancy: A Review of the Literature*, II *Risking the Future*, *supra* note 2, at 93, 116-122.

[20] Burt, *Estimating the Public Costs of Teenage Childbearing*, 18 Family Planning Perspectives 221, 223 (1986). *See* S. Hofferth, *Social and Economic Consequences of Teenage Childbearing*, in II *Risking the Future*, *supra* note 2, at 123, 140-41.

[21] *See, e.g.*, Sisto, *Therapeutic Foster Homes for Teenage Mothers and Their Babies*, 64 Child Welfare 157 (1985). Covenant House, in its New York program alone, provides crisis services and shelter to over 800 adolescent mothers who bring with them over 1000 infants and toddlers; the vast majority have nowhere else to go and are unable to subsist on public assistance.

[22] T. Bell & K. Hein, *Adolescents and Sexually Transmitted Diseases*, in *Sexually Transmitted Diseases* 73, 77, 82 (Holmes ed. 1984) (hereinafter "Sexually Transmitted Diseases").

ease, and syphilis are serious dangers for sexually active teenagers, and, indeed, early coitus has been found to produce an increased risk of cervical cancer.[23] Now Acquired Immune Deficiency Syndrome presents a health threat to such youths of an entirely different magnitude.[24] Somewhat less melodramatic, but no less telling, are the emotional and psychological consequences of uncommitted adolescent sex. Thus a substantial body of psychiatric opinion now holds that, for adolescents:

> the new sexual freedom has by no means led to greater pleasure, freedom, and openness, more meaningful relationships between the sexes or exhilarating relief from stifling inhibitions. Clinical experience has shown that the new permissiveness has often led to empty relationships, feelings of self-contempt and worthlessness . . . .[25]

It may result, as well, in "pervasive feelings of guilt" and "severe emotional conflicts".[26]

Crucial to this case is the recognition that only through reduction in current levels of adolescent premarital sexual intercourse can these frightening problems be successfully addressed. It is worth particular note that the alternative strategy of encouraging use of contraception and abortion by teenagers is of remarkably limited value. Thus adolescent contraceptive failure rates are extremely high for

[23] *Id.* at 79-81 (and studies cited therein).

[24] *See generally AIDS and Teenagers: Emerging Issues, Hrg. Before the House Select Comm. on Children, Youth, and Families, 100th Cong., 1st Sess.* (1987).

[25] A. Nicholi, *The Adolescent*, in *The Harvard Guide to Modern Psychiatry* 519, 530 (1980).

[26] *Id.*

all forms of contraception,[27] and in practice their use of contraceptives "approaches an almost random pattern":[28] it is at present problematic at best to contend that higher levels of family-planning services will alone reduce adolescent pregnancy rates.[29] Worse, the contraceptive pill, which apart from abstinence provides the most effective birth control for teenagers, has been found to be associated with increased risk for contracting certain sexually transmitted diseases[30] and possibly an increased risk of breast and cervical cancer.[31] Abortion, too, has health risks,[32] quite apart from the difficult emotional and moral issues it may raise for vulnerable adolescents.

Helping teenagers to avoid or at least delay premarital sexual intercourse, then, is good public policy, and good

[27] Grady *et al.*, *Contraceptive Failure in the United States: Estimates from the 1982 National Survey of Family Growth*, 18 Family Planning Perspectives 200 (1986) (11.0% one-year pregnancy rate for women under 18 using the pill to prevent pregnancy; 10.5% for IUD; 18.4% for condom, *id.* at 207).

[28] F. Bolton, *The Pregnant Adolescent: Problems of Premature Parenthood* 35 (1980).

[29] Thus the data from one recent study showed a positive correlation between the percentage of teenagers served at family-planning clinics and adolescent pregnancy rates. Singh, *Adolescent Pregnancy in the United States: An Interstate Analysis*, 18 Family Planning Perspectives 210, 217 (1986).

[30] S. Aral & K. Holmes, *Epidemiology of Sexually Transmitted Diseases*, in *Sexually Transmitted Diseases*, *supra* note 22, at 126, 137-38.

[31] *See, e.g.*, McPherson & Drife, *The Pill and Breast Cancer: Why the Uncertainty?*, 293 Br.Med.J. 709 (1986); *Oral Contraceptives and Breast Cancer*, The Lancet 665 (9/20/86); *Another Look at the Pill and Breast Cancer*, The Lancet 985 (11/2/85); Olsson *et al.*, *Oral Contraceptive Use and Breast Cancer in Young Women in Sweden*, The Lancet 748 (3/30/85).

[32] *See* Strobino, *supra* note 19, at 105-111. Some evidence suggests that abortion before first-term pregnancy may increase the risk of breast cancer. *See, e.g.*, Vessey *et al.*, *Oral Contraceptive Use and Abortion Before First Term Pregnancy in Relation to Breast Cancer Risk*, 45 Br.J.Cancer 327 (1982).

public policy of a particularly compelling kind. At stake are the health of millions of adolescents and small children, as well as the ability of government to avoid excruciating short- and long-term demands on its resources. What the challenged Act attempts is only a tentative first step in what must ultimately be a principal direction of assistance to adolescents.

II.

The Challenged Act Threatens No Conflict With the Establishment Clause.

The court below was therefore surely right to find the intentions of the Act "well-founded and benign", U.S. J.S. App. 44a; what it failed, in part, to understand was the importance those intentions have for the second and third prongs of the *Lemon* test. By not attending to the specifically secular thrust of the Act's provisions, and by not considering the lack of credible policy alternatives available to Congress, the District Court produced an opinion as potentially damaging to Establishment Clause jurisprudence as its order is harmful to adolescents in need of preventive services.

As recently restated by the Court, the latter two tests for Establishment Clause violations are familiar:

> . . . second, [the statute's] principal or primary effect must be one that neither advances nor inhibits religion . . .; finally, the statute must not foster an excessive entanglement with religion.

Grand Rapids School District v. *Ball*, 473 U.S. 373, 382 (1985) (quoting *Lemon* v. *Kurtzman*, 403 U.S. 602, 612-613 (1971) (citations omitted). Thoughtful attention to balanced notions of what "religion" means in this context, to

the very terms of the Act, and to the use of the adjectives "principal," "primary," and "excessive" in the *Lemon* formulation, can only lead to conclusions sharply divergent from those adopted below.

A. *The Act Has No Relevance to Promotion of "Religious Doctrine".*

At the essence of the District Court's analysis of the Act is its view that it "contemplates subsidizing a fundamental religious mission" of organizations "affiliated with" certain religions. U.S. J.S. App. 30a. That "mission", apparently, is to instruct the "fundamental tenet of [such] religions that premarital sex and abortion are wrong, even sinful." *Id.* Providing aid to "religious organizations" for "the purpose of encouraging abstinence and adoption" has, q.e.d., the "primary effect" of advancing religion. *Id.* at 30a-32a.

Yet this is, at best, a serious misrepresentation of the "religious doctrines" supposedly at stake, and, at worst, a grotesque parody of what "religion" means in relation to secular values. The lower court identifies *no* religion that teaches its adherents specifically what the Act commands its grantees to proclaim: that premature sexual intercourse by teenagers "often results in severe adverse health, social, and economic consequences", 42 U.S.C. § 300z(5), and that adoption of children born out of wedlock can be a "positive option . . . as a means of providing permanent families for such children." 42 U.S.C. § 300z (6)(A). And even a cursory recollection of what "religious doctrine" actually relates to in this area suggests the impossibility of ever identifying such a "church."

For no "religion", properly understood, ever bases its exhortations primarily on "health" or "social" or "economic" consequences of specific actions; nor, indeed, do its claims

relate primarily to *actions* at all. It is *"belief"* that is at the heart of "religion" within the meaning of the First Amendment—that is, ideas based on some (unprovable) "faith". *See Edwards* v. *Aguillard,* —— U.S. ——, 96 L.Ed.2d 510, 525-526 (1987) (distinguishing the teaching of theory based on "religious belief" from teaching of "scientific critiques"). Government's efforts to cause citizens to *act* differently—as opposed to believing, speaking or writing differently—do not normally present substantial First Amendment concerns. *See United States* v. *O'Brien,* 391 U.S. 367, 379-380 (1968). The challenged Act is no more, and no less, than such an effort: to get teenagers to alter their sexual *behavior* whether or not they believe it to be "wrong" or "sinful". Congress has sought merely to convince them that certain behavior is stupid.

It is precisely the *super*natural claim of religion on thought that makes the Establishment Clause necessary to prevent political and social disarray—for how can civilized argument be conducted in a religiously pluralistic society if a governing group claims some special contact or warrant from a deity? *See Board of Education* v. *Allen,* 392 U.S. 236, 251-252 (1968) (Black, J., dissenting). Conversely, education and discussion regarding empirical facts about "health, social, and economic consequences" of certain activities is exactly what good government can sponsor without provoking sectarian and political discord. *See Walz* v. *Tax Comm'n,* 397 U.S. 664, 695-697 (1970) (Harlan, J., concurring). Religious people, and the religious organizations they establish, are just as capable of discussing such facts as any others, and in doing so cannot be seen as promoting "religious doctrine," even where fact does not contradict doctrine.

It is, moreover, a travesty to portray hostility toward "premarital sex" as a "fundamental tenet" of the religions

the Act is supposed to "advance".[33] At least some of the religions in question would view with horror a sexual agenda limited to the simple prevention of intercourse; thus the Roman Catholic Church, so prominent in the lower court's analysis, preaches with equal fervor against many sexual behaviors that have *no* clearly negative empirical consequences and, indeed, against many sexual *feelings*.[34] And conversely, the great Christian writers have often railed at imagining that merit has been obtained simply through containing sexual passions.[35]

What is this "religion" that the Act is "advancing", and how is the promotion occurring? Just as "religions" and cultures have vastly differing views of appropriate adolescent sexual conduct,[36] so it is impossible to pigeonhole the

[33] The church most frequently mentioned by the lower court, and whose doctrines were presumably most substantially "advanced" by the Act, was the Roman Catholic Church. *See* U.S. J.S. App. 33a-38a.

[34] *See, e.g.*, R. Lawler *et al.*, *Catholic Sexual Ethics* 187 (1985) (masturbation "seriously wrong"); *id.* at 195 ("incomplete acts of lust" such as "fondling or kissing . . . aimed at stirring up sexual arousal" are "gravely sinful"); *id.* at 173 ("preoccupation with sexual pleasure" sinful even for married couple).

[35] Thus St. Augustine has it: "And if there be some . . . citizens who seem to restrain and, as it were, temper those passions, they are . . . elated with ungodly pride . . . . And if some, with a vanity monstrous in proportion to its rarity, have become enamoured of themselves because they can be stimulated and excited by no emotion, moved or bent by no affection, such persons rather lose all humanity than obtain true tranquility. For a thing is not necessarily right because it is inflexible, nor healthy because it is insensible." *City of God* 456 (M. Dods trans. 1950) (bk. 14, ch. 9). C. S. Lewis was pithier: ". . . a cold, self-righteous prig who goes regularly to church may be far nearer to hell than a prostitute. But, of course, it is better to be neither." *Mere Christianity* 95 (1960).

[36] *See* S. Frayser, *Varieties of Sexual Experience* 201-206 (1985) (37% of 51 societies studied around the world do not censure premarital sex, *id.* at 204); M. Mead, *Coming of Age in Samoa* 161 (1961) ("passive acceptance" of "sexual irregularities" among Samoan adolescents by Christian missionaries).

Act's clearly secular programme into the tenets of any sect. And because it is concerned solely with *behavior,* and behavior strictly relevant to the grave secular concerns surrounding teenage pregnancy and sexually transmitted disease, the Act has no relevance, certainly no "principal or primary" relevance, to "religious *doctrine*."

B. *The Structure and Terms of the Act Adequately Guard Against "Entanglement" of Government and Religion.*

Upon finding that "counselling" related to sexual activity necessarily tended to "advance" religion, it seemed an easy step for the lower court to conclude that *Lemon's* "entanglement" test had also been violated by the Act. U.S. J.S. App. 39a-43a. In the court's view, the prevention of indoctrination by religious organizations would "require extensive and continuous monitoring and direct oversight of every counselling session." *Id.* at 41a.

Discussing the hard facts of adolescent sex and pregnancy is not, as discussed above, plausibly related to the quite different task of implanting belief in supernatural persons and forces. Yet the District Court does point to instances where it believes "religious organizations" exploited the opportunity provided by the Act to promote sectarian values. *Id.* at 32a-38a. Does that mean that government monitoring of the type described is necessary simply to guard against abuse?

The Act itself provides a specific answer to that question. For it requires that grantees spend between one and five percent of their awards to obtain comprehensive "evaluations of the services supported", such evaluations to be conducted by a "college or university located in the grantee's State". 42 U.S.C. § 300z-5(b). Thus the Act on its face provides a reliable, non-entangling means to assure that the explicit Congressional directives against

proselytizing are observed. It is "*governmental* supervision" of the line between secular and sectarian that raises "entanglement" concerns in educational-aid settings, *Aguilar* v. *Felton*, 473 U.S. 402, 418-419 (Powell, J., concurring) (emphasis added); here the government has found a means of verifying both the effectiveness of funded programs and their conformity with statutory requirements *without* any "ongoing" or even transient "presence of state personnel" for monitoring purposes. *See id.* at 413 (opinion of the Court).

In other concrete ways, too, the Act's programs seem far less subject to public mispereception than those previously struck down by this Court. Most importantly, participation of adolescents is strictly voluntary—*i.e.*, not provided in the context of mandatory school attendance. Likewise, participation is confidential, 42 U.S.C. § 300z-5 (a)(11), with no danger that the youths involved will be religiously labelled through the programs. Finally, no small children are involved, only adolescents, with "priority" given to serving a population of adolescents (those in areas with a "high incidence of adolescent pregnancy") likely to have had more real-world experience of the issues to be discussed. 42 U.S.C. § 300z-4(a)(2). They are, in sum, a group who can easily walk away from a program that preaches religion, and indeed are likely to do so. The one-on-one and confidential nature of the "counselling" so feared by the District Court, moreover, makes it actually much less likely than classroom teaching to provoke controversy among parents or the general public.

On a more general basis, though, the lower court's "entanglement" analysis seems especially misguided, even perverse. For it closes its eyes to the fact that religiously affiliated organizations are not prohibited from receiving, and do receive, federal funding to provide extensive services, including counselling, to adolescents in such govern-

ment-funded programs as foster care, *see* 42 U S.C. § 608, crisis services for runaway and homeless youth, 42 U.S.C. §§ 5701-5751, and juvenile delinquency prevention, *see* 42 U.S.C. § 5634. *See, e.g., Wilder* v. *Bernstein*, 645 F. Supp. 1292 (S.D.N.Y. 1986) (foster care). Is it religious proselytizing or "entanglement" to counsel a youth that premarital sex may have serious health, social, and economic consequences, but *not* constitutionally offensive for a religiously affiliated organization to urge a runaway to return home (Exodus 20:12) or to avoid violence and theft (Exodus 20:13,15)?

The District Court was not prepared to wrestle with this question because, at the base of its analysis is an unrecognized, and unjustified, assumption that sexual conduct is somehow *more* central to "religion" than other aspects of human life. It therefore proceeded to find "entanglement" in the context of sexuality counselling where it would never have done so in other areas where religious doctrine and sound public policy happen to coincide. That finding is insupportable.

C. *Because the Act's Inclusion of "Religious Organizations" Is Necessary to Accomplishment of Its Wholly Secular Purposes, and Because Those Purposes Include the Compelling Need to Protect Children From Harm, It Must Be Sustained as a Reasonable Exercise of Government Power Under the First Amendment.*

The decision of Congress to include charities with religious affiliations in the Act's strategy was a deliberate, and necessary one. Such organizations are crucial for reaching minority populations, S. Rep. No. 496, 98th Cong., 2d Sess. 10 (1984),[37] and of course it is among minority

[37] It is worth noting in this regard that recent research suggests enrollment of nonwhite teenagers in traditional, almost exclusively

(footnote continued on following page)

teenagers that premarital pregnancy and birth are most extensive.[38] Adolescent sexual activity and pregnancy cannot be explained simply with crude socioeconomic measures,[39] and they cannot be effectively addressed without addressing "culture", which "fundamentally affects sexuality and fertility", and of which religious organizations are a prominent part.[40] For all teenagers, not just those in minority groups, the decision to initiate sex or to bear a child will be made in *whole* context of their environment;[41] excluding one of the most significant aspects of that environment in sexuality counselling would be self-defeating and harmful. See S. Rep. No. 496, *supra*, at 10.

Does the First Amendment require such exclusion, in an area where children and teenagers suffer severe health, social, and economic harms, and where Congress found the participation of religiously affiliated charities crucial

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(footnote continued from previous page)

non-sectarian family planning clinics has no positive statistical impact on their fertility rates. Anderson & Cope, *The Impact of Family Planning Program Activity on Fertility*, 19 Family Planning Perspectives 152, 155 (1987). For white teenaged women, by contrast, such enrollment has a strong negative statistical impact on fertility after appropriate controls. *Id.*

[38] Thus black teenaged girls bear out-of-wedlock children at rates currently four times higher than their white peers, I *Risking the Future*, *supra*, at 66, with rates for hispanic teenagers between the two extremes. *Id.* at 65.

[39] *Id.* at 97-99.

[40] *Id.* at 93.

[41] Thus "religiousness" (*i.e.*, intensity of adherence to *any* "religion," regardless of its dogmatic content) is an "important factor distinguishing early from later initiators of sexual activity", *id.* at 99, but so, too, are family characteristics, *id.* at 102-104, "community standards and expectations," *id.* at 99, and "academic achievement" and "educational goals". *Id.* at 100. "Religious *affiliation*", by contrast, shows little relationship to such activity, *id.* at 99-100 (and studies cited therein), indicating the fallacy of the lower court's crude effort to connect sexual *behavior* with creed.

to its attempt to address those harms? Some forty years ago this Court formulated the principles for answering that question:

> A democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens, with all that implies. It may secure this against impeding restraints and dangers within a broad range of selection.

Prince v. *Massachusetts*, 321 U.S. 158, 168 (1949). From the decision in *Prince* that religious liberty under the First Amendment could be limited where necessary to protect children from serious harm, to the more recent formulation of that view of the First Amendment in *New York* v. *Ferber*, 458 U.S. 747, 758-764 (1982), and *id.* at 776 (Brennan, J., concurring), it has been clear that First Amendment "tests" must never be so rigid as easily to contemplate the avoidable infliction of serious harm on minors. *See also, Ginsburg* v. *New York*, 390 U.S. 629 (1968). That it is the Establishment Clause which is involved in this case is of no moment, for "it may be doubted that any of the great liberties insured by the First Amendment can be given higher place than others. All have preferred position in our basic scheme. . . . All are interwoven there together." *Prince* v. *Massachusetts*, *supra*, 321 U.S. at 164 (citations omitted).[42]

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[42] *Aguilar* v. *Felton*, 473 U.S. 402 (1985), and *Grand Rapids School District* v. *Ball*, 473 U.S. 373 (1985), are not to the contrary. The remedial education programs reviewed in those cases were nowhere asserted to be crucial to avoiding harms to children of the magnitude of those associated with child labor, *Prince* v. *Massachusetts*, *supra*, child pornography, *Ferber*, *supra*, or adolescent pregnancy. Further, comparable programs could be provided in public schools or public facilities, where Congress here was *compelled* to include religious organizations in the scope of the Act to have any hope of credibly addressing the teen pregnancy problem at all. *See* text to notes 38-41, *supra*.

Accommodating the compelling interests at stake under the Act with the tests of *Lemon* v. *Kurtzman*, fortunately, is not impossible or even difficult. For it is only "principal or primary" effects tending to advance or inhibit religion, and only "excessive" entanglement that those tests proscribe. 403 U.S. at 612-613. Any substantial reduction in teenage sexual activity or pregnancy resulting from sexual education and counselling surely would be an effect of the Act utterly dwarfing any of the theoretical doctrinal effects conjured up by Appellees and the lower court.[43] And government action to address searing harms to children and youth, through facially secular means, is unlikely ever to involve *excessive* "entanglement" simply in permitting participation by religious organizations. What the lower court's opinion failed to appreciate fully is that *Lemon's* tests themselves contemplate balancing of competing interests and degrees of possible harm, and "[depend] on all the circumstances of a particular relationship." *Lemon* v. *Kurtzman*, *supra*, 403 U.S. at 614. The Act—and every teenager it attempts to protect—deserves better than the "legalistic minuet" to which Appellees invite the Court. *Id.*

[43] In renewing the Act in 1984, Congress took note of the fact that since its passage "the trend of [teen pregnancy rates] is improving for the first time since 1973." S. Rep. No. 496, 98th Cong., 2d Sess. 6 (1984). At the very least the Act's first few years suggested that its projects "will provide valuable information to help identify successful innovative approaches for use by State and local service providers." *Id.*

III.

The District Court's Definition of Proscribed "Religious Organizations" Is Seriously Confused and Overbroad.

Religiously affiliated charities deserve better, too, than the undifferentiated scorn they received from the District Court. Its opinion appears to threaten a prohibition on *any* participation, funded or unfunded, in "carrying out the programs and purposes of the Act" by all organizations with explicit ties to "any particular religious faith" or to any "religious doctrine". U.S. J.S. App. 35a, 47a-48a. As the Secretary and United Families of America ("U.F.A.") have eloquently demonstrated in their respective jurisdictional statements, this amounts to an evisceration of this Court's patient efforts to distinguish "pervasively sectarian" organizations from those with only limited sectarian ties. *See* U.F.A. J.S. 18-19 (Case No. 87-775); U.S. J.S. 14-16.

For "religious" charities and their clients, of course, far more is at stake than purity of legal doctrine. At Covenant House's own programs under the Act, over 200 teenage mothers, along with three dozen teenage fathers, are at any one time receiving substantial, desperately needed help. *See* Jt. App. 639-641 (Affidavit of Rev. Bruce Ritter). Independent outside evaluation of those programs has revealed that while serving "a particularly difficult population", they have been "successful in reducing the rate of pregnancies among the teen mothers".[44] Further, they increased the knowledge of clients regarding health, nutri-

[44] E. Shinn, Covenant House Adolescent Family Life Project: Interim Year Evaluation 9, 20 (1987) (filed with Office of Adolescent Pregnancy Programs, U.S. Dep't of Health and Human Services).

tion, sexuality, parenting, education, and job training—"establishing a good foundation on which [they] could build." [45]

The president of Covenant House is a Catholic priest, but proselytizing religion is never allowed in its programs, and religious dogma or doctrine plays no role in the counselling it offers adolescents in its programs. Jt. App. 93-94 (Ritter Affidavit). Its board of directors is non-sectarian and subject to no control by any outside church or religious body. The homeless and runaway children it serves come from every faith. Under no reasonable criteria, therefore, could Covenant House be judged "pervasively sectarian"; yet it is proud of its ties to the Roman Catholic Church, and grateful for the diverse religious and moral faiths of its employees and volunteers.

Covenant House may not be strictly typical of religiously affiliated grantees under the Act, but clearly the problems posed by the District Court's extraordinary order will be just as grave for children and adolescents in all such programs. If that order is enforced, it will cause irreversible harm to those young clients and to all those program employees who have in good faith tried to help them. It will herald, too, the beginning of a war on the involvement of religiously affiliated charities in any public efforts to aid the weak and disadvantaged.

As this Court has long maintained, the Establishment Clause "requires the state to be neutral in its relations with groups of believers and non-believers; it does not require the state to be their adversary." *Everson* v. *Board of Education*, 330 U.S. 1 (1947). The District Court on remand should at least be required to limit its holding to abuses actually found, and to exempt any but the most "pervasively sectarian" organizations from its order.

[45] *Id.* at 9-10.

CONCLUSION

> I always remember, though, the first time I ever did it, the next morning coming home, and I had my best friend with me. And I just started crying to her saying, "Oh my God. I know I am pregnant." I mean, the next day. "What am I going to do, how can I have done that? Why did I do that? How could I have been so stupid? I know I'm pregnant." [I] bawled my eyes out.
>
> Indianapolis Teenager[46]

Crying out "Oh my God" can be as much an expression of pain, or despair, as it is of belief. It can be a response to the crushing burden of adolescent parenthood, to the birth of a premature, underweight child, or to the discovery of sexually transmitted disease. It can be the anguished reaction of a legislator challenged to "solve" the problems created by teenage sex and pregnancy. It can be the unspoken prayer of a counsellor trying to tell a sullen teenager the facts of adult life.

Thomas Jefferson's, and the *Everson* Court's, "wall of separation" stands "between Church and State". 330 U.S. at 16. It was not meant to stand between legislators and children in peril of ruined health and shattered futures. This Act—and the efforts of religious and nonreligious organizations it sanctions—may not end the national tragedy, or dry all the tears, of children who grow old too soon. But neither does it violate the First Amendment.

[46] Kisker, *supra* note 1, at 85.

The judgment of the United States District Court for the District of Columbia should be reversed.

Respectfully submitted,

Gregory A. Loken
Institute for Youth Advocacy
Covenant House
460 West 41st Street
New York, New York 10036
(212) 613-0349

Counsel for Amicus Curiae

Certificate of Service

I hereby certify that on the 7th day of January, 1988, three copies of the annexed *amicus curiae* brief were mailed, postage prepaid, to:

(1) Janet Benshoof
Lynn M. Paltrow
Suzanne Sangree
Rachel Pine
American Civil Liberties Union Foundation
132 West 43rd Street
New York, New York 10036

Bruce J. Ennis
Ennis, Friedman, Bersoff & Bersoff
1200 17th Street, N.W.
Suite 511
Washington, D.C. 20036

Counsel for Appellees

and

(2) Charles Fried
Solicitor General
Department of Justice
Washington, D.C. 20530

Counsel for Appellant

.....

Gregory A. Loken
460 West 41st Street
New York, New York 10036

Counsel for Amicus Curiae
Institute for Youth Advocacy,
Covenant House

Nos. 87-253, 87-431, 87-462, 87-775

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

OTIS R. BOWEN, Secretary of Health & Human Services,

Appellant,

v.

CHAN KENDRICK, *et al.*,

Appellees.

CHAN KENDRICK, *et al.*,

Cross-Appellants,

v.

OTIS R. BOWEN, Secretary of Health & Human Services, and SAMMIE J. BRADLEY, *et al.*,

Cross-Appellees.

UNITED FAMILIES OF AMERICA,

Appellant,

v.

CHAN KENDRICK, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE AND BRIEF FOR THE CATHOLIC LEAGUE FOR RELIGIOUS AND CIVIL RIGHTS, AND CONCERNED WOMEN FOR AMERICA, AMICI CURIAE

STEVEN FREDERICK MCDOWELL
Catholic League for Religious
and Civil Rights
1100 West Wells Street
Milwaukee, Wisconsin 53233
(414) 289-0170

Counsel of Record
for Amici Curiae

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MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE

The Catholic League for Religious and Civil Rights (hereinafter League) and Concerned Women for America (hereinafter CWA), pursuant to Rules 36.3 and 43 of the Rules of this Court, respectfully move for leave to file the appended brief amici curiae in support of Otis R. Bowen, Secretary of Health and Human Services and United Families of America, *et al.*, in these cases.

The League is a voluntary non-profit organization, national in scope, dedicated to the right to religious freedom and the right to life of all born or unborn. In pursuit of its interest in religious freedom, the League is especially concerned with ensuring that the Establishment Clause is not interpreted in manners which discriminatorily preclude religious entities from participation in programs ostensibly open to all. To this end the League has filed amicus curiae briefs with this Court in such cases as *Aguilar v. Felton*, 473 U.S. 402 (1985), in which it urged that the Establishment Clause not be used as a bar to government provision of remedial services to students in religiously oriented schools.

CWA is a national, non-profit women's organization based in Washington, D.C. CWA's purpose is to preserve, protect and promote traditional and Judeo-Christian values through education, legal defense, humanitarian aid to refugees and legislative programs. CWA is also extremely concerned with government programs which deprive individuals and institutions of benefits because of their religious motivations or affiliations. This concern was most directly expressed in *Witters v. Washington Department of Services for the Blind*, 106 S. Ct. 748 (1986). In that case, CWA attorneys represented an individual before this Court who had been improperly deprived of governmental benefits because of his choice of religious education.

The League and CWA will address the Establishment Clause questions in this case from a perspective emphasizing the Establishment Clause's policy of preservation of free-

dom of conscience through elimination of orthodoxy on religious matters. The brief will also outline the Establishment Clause difficulties resulting from judicial elimination of funding for religious groups. Although the Establishment Clause issues will certainly be addressed by all parties, it is unlikely that the parties will address these issues from the policy perspectives which the Catholic League and CWA will furnish. Thus, a brief from the Catholic League and CWA will be useful to the Court in its disposition of this case.

The League and CWA have applied to counsels of records for all parties for their consent to file this brief. However, when this brief went to the printer, consent for filing a joint brief had not yet been received. In the relatively likely event consent letters are received, they will be filed with the Clerk of this Court and this motion will be withdrawn.

For the foregoing reasons, the League and CWA move for leave to file the appended brief amici curiae.

Respectfully submitted,

STEVEN FREDERICK MCDOWELL
Catholic League for Religious
and Civil Rights
1100 West Wells Street
Milwaukee, WI 53233
(414) 289-0170

Counsel of Record for
Amici Curiae

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Nos. 87-253, 87-431, 87-462, 87-775

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

OTIS R. BOWEN, Secretary of Health & Human Services,

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE CATHOLIC LEAGUE FOR RELIGIOUS AND CIVIL RIGHTS AND CONCERNED WOMEN FOR AMERICA, AMICI CURIAE

INTERESTS OF AMICI CURIAE

The interests of The Catholic League for Religious and Civil Rights and Concerned Women for America, as amici curiae are set forth in the Motion for Leave to File Brief Amici Curiae.

SUMMARY OF ARGUMENT

The district court's decision in this case is a classic illustration of this Court's observation that: "[F]ocus exclusively on the religious component of any activity would inevitably lead to its invalidation under the Establishment Clause." *Lynch v. Donnelly*, 465 U.S. 668, 680 (1984). By focussing only upon religiously oriented grant recipients under a single government program addressing adolescent sexuality and by not considering Establishment Clause difficulties raised by prohibiting these groups from funding, the district court's decision failed to implement the important policies underlying the Establishment Clause.

Legal tests developed under the Establishment Clause are useful only insofar as they implement the policies underlying the Establishment Clause. The Establishment Clause's purpose is to prohibit conduct which "in reality . . . establishes a religion or religious faith, or tends to do so." *Lynch*, 465 U.S. at 678 *citing Walz v. Tax Commission*, 397 U.S. 664, 669 (1970). This purpose proceeds from the policy of preserving "the individual's freedom of conscience [which is] the central liberty which unifies the various clauses in the First Amendment." *Wallace v. Jaffree*, 472 U.S. 38, 50 (1985). In the context of the Establishment Clause this policy is carried out by ensuring that "no official, high or petty, can prescribe what shall be called orthodox in politics, nationalism, religion or other matters of opinion or force citizens to confess by word or act their faith therein." *Wallace*, 472 U.S. at 55 *quoting Board of Education v. Barnette*, 319 U.S. 624, 642 (1943).

Proper interpretation of these Establishment Clause poli-

cies requires that a court appropriately frame the issue and focus its inquiry. *See Lynch*, 465 U.S. at 680. Instead of examining the totality of government action in the area of adolescent sexuality, the district court improperly narrowed its analysis to the fact that the Adolescent Family Life Act (AFLA) funded "religious organizations." This focus failed to implement the Establishment Clause in light of its underlying policy of insuring individual freedom of conscience for four basic reasons. First, the district court improperly considered the AFLA in a "vacuum" and did not look at other governmental conduct in the area of adolescent sexuality which could legitimately be characterized as hostile to religion. Second, the district court improperly considered only the funding of religious organizations under the AFLA instead of examining all funding under that statute. *See Witters v. Washington Department of Services for the Blind*, 106 S. Ct. 748, 754-755 (1986) (Powell, J., concurring) (In determining Establishment Clause questions the court must look at nature and consequences of program as a whole rather than characteristics of particular funding recipients). Third, and most significantly, the district court failed to grasp the serious Establishment Clause difficulties resulting from *barring* theistically oriented groups from funding. Such a bar inhibits religion and individual freedom of conscience by forcing theistically oriented groups to shed religious affiliations or motivations if they are to take part in programs ostensibly open to all. Finally, the district court's order that religious groups be forbidden from funding under the AFLA aggravates, rather than cures, Establishment Clause difficulties by effectively establishing a non-theistic orthodoxy on questions of religious significance.

Since the district court's analysis failed to implement the Establishment Clause in the spirit of its underlying policy of protecting individual freedom of conscience, an alternative approach must be taken. Two such approaches would appear available.

The first would be a determination by this Court to take a generally more relaxed judicial approach to this case and other Establishment Clause cases. Building upon foundations

laid in such cases as *Mueller v. Allen*, 463 U.S. 388 (1983) and *Witters v. Washington Department of Services for the Blind*, 106 S. Ct. 748 (1986), this Court would uphold government funded programs which are open to all irrespective of religious affiliations or belief. Under such a construction Establishment Clause policies would be implemented because no individual or institution would be required to alter religious affiliations or beliefs to participate in a program. Further, governmentally supported orthodoxy would be prevented because permitting a broad variety of groups to be funded would allow a diversity of perspectives to be furnished which would be unavailable if religious groups were the exclusive entities funded, or as the district court decreed, excluded from funding entirely.

A second alternative approach would be a rigorous effort to ensure that government not establish an orthodoxy on religiously significant questions of adolescent sexuality. However, the Court must be prepared to face the fact that such an approach will require the elimination of *all* governmentally financed programs in the area of adolescent sexuality, not merely the prohibition of funding of religious groups under the AFLA or even the invalidation of the entire AFLA. However, the insulation of the religiously significant area of adolescent sexuality from government influence which would result from elimination of government funding for all adolescent sexuality programs would certainly implement the Establishment Clause. Governmentally supported orthodoxy would be eliminated because all decisions to fund groups in this area would become individual decisions of conscience rather than governmental actions.

ARGUMENT

I.

AN ESTABLISHMENT CLAUSE DECISION MUST IMPLEMENT THE POLICY OF FREEDOM OF CONSCIENCE THROUGH ELIMINATION OF ORTHODOXY ON RELIGIOUS MATTERS.

As the district court's decision demonstrates, Establishment Clause analysis often utilizes multi-faceted tests designed to gauge the conformity of government action to constitutional mandates. However, any Establishment Clause test or analysis is useful only insofar as it provides a means to implement the policies which underlie this constitutional protection. *See Lynch v. Donnelly*, 465 U.S. 668, 678 (1984) ("[T]he Court has scrutinized challenged legislation . . . to determine whether, in reality, it establishes a religion or religious faith, or tends to do so . . . The Establishment Clause . . . is not a precise, detailed provision in a legal code capable of ready application. [Its] purpose . . . 'was to state an objective not to write a statute.' ") (citations omitted). Thus, inquiry in this case must begin with an examination of the policies upon which the Establishment Clause is founded.

The Establishment Clause's purpose is prohibiting conduct which, "in reality, . . . establishes a religion or religious faith, or tends to do so." *Lynch*, 465 U.S. at 678 *citing Walz v. Tax Commission*, 397 U.S. 664, 669 (1970). This purpose proceeds from the policy which unifies the entire First Amendment. In *Wallace v. Jaffree*, 472 U.S. 38, 50 (1985), this Court explained that "the individual's freedom of conscience [is] the central liberty which unifies the various clauses in the First Amendment." (footnote omitted). Accordingly, any governmental action which furthers this central liberty implements Establishment Clause interests, while any governmental action impeding this liberty is suspect. Thus, legal tests implementing the Establishment Clause are properly employed only if their application advances the central constitutional liberty of preserving the individual's freedom of conscience.

In the Establishment Clause area the policy of individual freedom of conscience specifically requires that "no official, high or petty, can prescribe what shall be called orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *Wallace*, 472 U.S. at 55 *quoting Board of Education v.*

Barnette, 319 U.S. 624, 642 (1943). Thus, the Establishment Clause, read in light of its underlying policy of protecting freedom of conscience, prohibits government from favoring or disfavoring religion in the course of its actions. Indeed, one prong of the Establishment Clause test formulated in *Lemon v. Kurtzmann*, 403 U.S. 602, 612 (1979) specifically commands that a government action's principal or primary effect be one that neither advances nor inhibits religion.

As this discussion makes clear, the Establishment Clause is a limit on governmental action, not on the action of religious institutions. Thus, proper Establishment Clause analysis must focus upon whether *government* action tends to establish a prohibited orthodoxy on questions of religious importance. Instead of carefully examining the nature of the government action in this case, the district court's analysis was largely an exploration of the religious affiliations or motivations of certain funding recipients. While this was an interesting exercise, it did not properly address the central concerns underlying the Establishment Clause. *See Witters v. Washington Department of Services for the Blind*, 106 S. Ct., 748, 754-755 (1986) (Powell, J., concurring) (In determining Establishment Clause questions a court must look at nature and consequences of governmental program as a whole rather than characteristics of particular funding recipients).

II.

THE DISTRICT COURT'S ELIMINATION OF FUNDING FOR RELIGIOUS ORIENTED INSTITUTIONS FAILS TO IMPLEMENT THE ESTABLISHMENT CLAUSE AND ITS UNDERLYING POLICY.

An examination of this Court's decision in *Lynch v. Donnelly*, 465 U.S. 668, 679-680 (1984), reveals the shortcomings in the district court's Establishment Clause analysis. In *Lynch* this Court recognized that Establishment Clause cases often turn upon the manner in which a court frames the issue and focuses its inquiry. When a court concentrates only upon government funding of a particular religious group, an Establishment Clause violation may seem clear. However, when a court considers every law addressing the subject in question, the character of every institution funded and the effect of excluding a group from funding solely on a religious basis, the Establishment Clause question becomes much more difficult. As the *Lynch* Court succinctly stated: "[F]ocus exclusively on the religious component of any activity would inevitably lead to its invalidation under the Establishment Clause." 465 U.S. at 680. Put another way, a statute's religious effect may appear "direct and immediate" when only its religious components are considered, but will prove "remote and incidental" when the court focuses more broadly, and more fairly, upon the totality of governmental action pertaining to an area of concern. The district court's examination of the Establishment Clause issue is a textbook example of the error which can result when a court focuses only upon the "religious" component of challenged legislation.

The district court's analysis can fairly be characterized as one focusing almost exclusively upon the fact that the Adolescent Family Life Act funded "religious organizations." Such a limited focus fails to properly gauge the statute's conformity with the Establishment Clause, especially when the Clause is read in light of its underlying policy of ensuring individual freedom of conscience in religious matters. Four major problems resulting from the district court's inappropriately narrow analysis are immediately apparent.

First, the district court improperly considered the Adolescent Family Life Act (AFLA) in a "vacuum." Instead of examining the AFLA in the broad context of government funding of all groups which address teenage sexuality, the district court isolated this program from others addressing this subject matter. Assuming that the district court was correct in its conclusion that many find questions regarding sexuality, contraception and abortion religiously significant,[1]

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[1] *See Kendrick v. Bowen*, 657 F.Supp. 1547, 1563 (D.D.C. 1987).

it should have examined the totality of government action in these fields. An examination of all government programs in these areas would likely have found a much greater level of government funding directed toward groups and projects whose positions on these issues are hostile to many traditional Judeo-Christian beliefs. But, none of these programs (i.e., Title X) was considered or mentioned by the district court. By focusing only upon the AFLA, government subsidization of traditional theistic religions appeared to exist in subject areas in which government funding has likely been provided predominantly to groups which strongly oppose the moral concepts of traditional theistic religion. If anything, funding of religious entities under the AFLA may have alleviated Establishment Clause problems in the areas of sexuality, contraception and abortion by lessening the degree to which government inhibited religion through its support of groups whose beliefs on these religiously significant issues are contrary to those of many of the religious organizations who received grants under the AFLA. Indeed, an examination of the Establishment Clause, in light of its underlying policy of preventing government supported orthodoxy on religious important issues, could well require the inclusion of both theistic and non-theistic recipients in programs addressing these issues.

Second, the district court's improperly limited focus was also apparent in its consideration of funding patterns under the AFLA. Just as the court considered the AFLA in isolation from other governmentally financed sexuality programs, it also improperly considered the funding of theistic groups in isolation from the overall pattern of funding under the AFLA. *See Witters v. Washington Department of Services for the Blind*, 106 S. Ct. 748, 754-755 (1986) (Powell, J., concurring) (In determining Establishment Clause questions court must look at nature and consequences of governmental program as a whole rather than characteristics of particular funding recipients). Even when judicial examination is confined to the AFLA, a full consideration of funding patterns would likely have found significant funding for groups which

do not concur with religiously oriented positions on sexually related issues.

However, the most significant shortcoming in the district court's analysis was its total failure to consider the Establishment Clause problems raised by a systematic exclusion of religiously oriented groups from government funding under the AFLA. Because the court focussed solely upon the constitutional implications of *funding* theistic groups, it failed to comprehend the serious Establishment Clause difficulties resulting from *barring* such groups from funding. Such a bar forces theistically oriented groups to shed religion affiliations or motivations if they are to take part in programs ostensibly open to all. This outcome inhibits religion, severely limits the funding of diverse viewpoints and promotes a state orthodoxy on the issues of sexuality and pregnancy which excludes religion. Such a result is directly contrary to the central Establishment Clause policy of preserving freedom of conscience through the prevention of government orthodoxy on religious issues. While straining to find the "splinter" of possible religious establishment through funding theistic groups under the AFLA, the district court was blind to the "plank" of the violation of central Establishment Clause policies which would result from the exclusion from funding of these same groups. Cf. Matthew 7:3.

The final major difficulty with the district court's analysis is closely related. The district court's remedy of eliminating theistically oriented groups from funding under the AFLA does not solve the Establishment Clause difficulties which the Court finds present in the AFLA. Instead, this remedy worsens the statute's Establishment Clause difficulties. Not only is governmentally subsidized teaching on supposedly religiously charged topics permitted to continue, but governmentally supported orthodoxy is furthered by the apparent permission of only a non-religious approach to issues thought to be inherently religious. This type of judicial attempt to develop a non-religious orthodoxy on issues of religious significance presents the same difficulties which inhere in any governmental pressure toward orthodoxy in such matters. As this Court noted in *Barnette:*

> As governmental pressure toward unity becomes greater, so strife becomes more bitter as to whose unity it shall be. Probably no deeper division of our people could proceed from any provocation than from finding it necessary to choose what doctrine and whose program public educational officials shall compel youth to unite and embrace. Ultimate futility of such attempts to compel coherence is the lesson of every such effort from the Roman drive to stamp out Christianity as disturber of its pagan unity, the Inquisition, as a means to religious and dynastic unity, the Siberian exiles as a means to Russian unity down to the fast failing efforts of our present totalitarian enemies. Those who begin coercive elimination of dissent soon find themselves exterminating dissentors. Compulsory unification of opinion achieves only the unanimity of the graveyard.

Barnette, 319 U.S. at 641.

These observations preceded the *Barnette* Court's landmark observation, which this Court repeated recently in *Wallace v. Jaffree:* "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *Wallace v. Jaffree*, 472 U.S. 38, 55 (1985) *quoting Barnette*, 319 U.S. at 641. Unfortunately, the district court's attempt to screen out religion aggravates the very Establishment Clause difficulties it is supposed to eliminate.[2]

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[2] These Establishment Clause difficulties are in addition to the serious Due Process problems which result from the exclusion of theistic groups from participation in programs in which all other groups are eligible to participate. These problems were noted in the Jurisdictional Statement of Otis R. Bowen. *See* Jurisdictional Statement of Otis R. Bowen, Case No. 87-431, at 14.

III.

IMPLEMENTATION OF ESTABLISHMENT CLAUSE POLICY WILL REQUIRE EITHER A MORE RELAXED ESTABLISHMENT CLAUSE ANALYSIS OR ELIMINATION OF ALL GOVERNMENT PROGRAMS PROVIDING FUNDING ON SEXUAL MATTERS.

Clearly the district court's decision failed to implement the Establishment Clause in the spirit of its underlying policy of protecting individual freedom of conscience. Fidelity to the Establishment Clause and its underlying policy requires this Court to choose either one of two alternative approaches to this case.

The first of these approaches may prove the most workable: the adoption of a more relaxed approach to Establishment Clause cases. Previous discussion has demonstrated that the district court's application of its version of a rigid Establishment Clause test failed to conform to the Establishment Clause's central policy of preservation of individual conscience through the prevention of governmental orthodoxy on religiously charged issues. An alternative would be for this Court to take a more relaxed approach to Establishment Clause cases in general, including this one. If this Court were to take such an approach, many of the absurdities of the type of analysis undertaken by district court would disappear.

This type of relaxed approach finds legal foundation in several of this Court's recent precedents. For example, in *Mueller v. Allen*, 463 U.S. 388 (1983) and *Witters v. Washington Department of Services for the Blind*, 106 S. Ct. 748 (1986), this Court determined that programs open to all withstood Establishment Clause scrutiny even if portions of appropriated funds went to religious entities. This type of construction appear truer to the Establishment Clause's policy of preventing government supported religious orthodoxy than the more rigid approach to the Establishment Clause found in many of the parochial school aid cases and improperly ap-

plied in this case.[3]

Under this approach, government funding could be understood as analogous to a forum government creates, opens to all, and thereafter is unable to exclude participants on religious grounds. Cf. *Widmar v. Vincent*, 454 U.S. 263 (1981) (state may not exclude student religious groups from utilization of meeting facilities available to other student groups based upon the religious content of the groups' speech). Establishment Clause policies would be implemented in several ways. No individual or institution would be required to alter religious affiliations or beliefs to participate in the involved program. A cross-section of religious and non-religious participants would participate, since religious factors would not justify any groups inclusion or exclusion. Government supported orthodoxy would be prevented since a diversity of perspectives would be furnished which would be unavailable if religious groups were either the exclusive bodies funded or, as the district court decreed, excluded from funding entirely. Establishment Clause problems would also be avoided because neither religious nor non-religious groups would be specifically required to be included in the program. *Compare Edwards v. Aguillard*, 107 S. Ct. 2573, 2581-2582 (1987) (state action requiring that teaching conform to specific religious position found inappropriate).

While the alternative just outlined appears the most sensible approach to this case, amici also recognize that this court may desire to follow a more rigid approach to preventing government sponsored orthodoxy on religiously charged issues. However, such an approach would require a complete prohibition of any government funding for programs dealing with teenage sexuality.

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[3] Indeed, the central philosophical foundation of the parochial school aid cases is extremely flimsy. For example, Justice O'Connor's dissent in *Aguilar v. Felton*, 473 U.S. 402, 427-429 (1985) (O'Connor, J., dissenting), convincingly demonstrates the fallaciousness of the major assumptions of the analysis used in many of the restrictive parochial school aid cases: the likelihood that teachers paid in such programs will attempt to advance religion and the entangling effects of any state monitoring of the teacher's performance.

As was seen previously, elimination of theistically oriented participants from funding under a teenage sexuality program otherwise open to all does not prevent government sponsored orthodoxy on these questions. Instead, it actually promotes such an orthodoxy. If questions of sexuality, pregnancy, contraception and abortion are religiously charged, as the district court has apparently decided, the elimination of government sponsored orthodoxy on these issues would demand that government be completely forbidden from financing programs for funding private groups in these areas.

This result is not necessarily a bad one. As this court recognized in *Barnette*, 319 U.S. at 636-637:

> Government of limited power need not be anemic government. Assurance that rights are secured tends to diminish fear and jealousy of strong government, and by making us feel safe to live under it makes for its better support. . . . To enforce those rights today is not to choose weak government over strong government. It is only to adhere as a means of strength to individual freedom of mind in preference to officially disciplined uniformity for which history indicates a disappointing and disasterous end.

The elimination of massive governmentally financed sexuality programs would allow these programs to be completely financed by the private sector. In the private sector, financing of programs dealing with teenage sexuality would be governed by individual decisions of conscience directing support to either theistic or non-theistic approaches to these questions. Accordingly, elimination of all governmentally supported grant programs in the area of teenage sexuality would certainly assure the absence of government supported orthodoxy and preservation of the rights of individual conscience.

Both rigid and flexible approaches to the Establishment Clause appear to have the potential of implementing that Clause's important central policy of preservation of individual

freedom of conscience through prevention of governmentally supported orthodoxy on religiously charged issues of sexuality. The district court's elimination of the participation of theistically oriented religious groups in AFLA programs conforms to neither of these approaches. Instead, it worsens the problem of governmentally supported orthodoxy, which is at the heart of the Establishment Clause's concerns, by eliminating the utilization of any theistic approach to issues it believes many find religiously significant. Since government may not place itself in a position either aiding or opposing religion, this Court must choose either a relaxed Establishment Clause test which prevents orthodoxy through non-discriminatory participation of individuals from all religious perspectives or choose a rigid Establishment Clause test which prevents any hint of governmentally sponsored orthodoxy by eliminating all government programs related to adolescent sexuality.

• CONCLUSION

The decision of the district court should be reversed.

Respectfully submitted,

STEVEN FREDERICK MCDOWELL
General Counsel
Catholic League for Religious
and Civil Rights
1100 West Wells Street
Milwaukee, WI 53233
(414) 289-0170

Counsel of Record for
Amici Curiae

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Nos. 87-253; 87-431

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Petitioner,

—and—

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Petitioner-Intervenor.

—vs.—

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Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF AMICUS CURIAE OF THE COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY

LEO PFEFFER
29 Ridge Terrace
Central Valley, New York 10917
(914) 928-6409
Attorney for Amicus Curiae

EDITOR'S NOTE

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TO THE UNITED STATES
DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA

BRIEF AMICUS CURIAE OF NEW YORK COMMITTEE
FOR PUBLIC EDUCATION AND RELIGIOUS
LIBERTY *

INTEREST OF THE AMICUS

The New York Committee for Public Education and Religious Liberty (PEARL), founded in 1966, is an association of organizations and individuals committed to the preservation of the dual principle of the separation of church and state and the free exercise of religion, as they

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PEARL organizations joining in this brief are listed in the Appendix.

relate to or affect education in the state of New York. To effectuate its purpose it has instituted suits, submitted briefs amicus curiae, testified before federal and state legislative bodies and engaged in general education programs for the community.

Because New York PEARL and its constituents deem direct financial contributions by the Federal Government to religious organizations to enable them to propagate their values among adolescents to be a serious threat to the principle of the separation of church and state, it respectfully submits this brief amicus curiae with the consent of all parties.

QUESTION TO WHICH THIS BRIEF IS ADDRESSED

This brief is addressed to a single

question: Is it an additional ground for affirming the district court's decision that the challenged statute, the Adolescent Family Life Act of 1981, [1] as enacted and applied, has a religious purpose and hence is subject to invalidation under the first part of the purpose-effect-entanglement test of constitutionality of the First Amendment to the Constitution? [2] In respect to effect and entanglement, New York PEARL adopts and submits as its own the amicus curiae brief of the National Coalition

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1. 42 U.S.C. 300z-300z-10. The Act is hereinafter referred to as AFLA.

2. The First Amendment reads in part: "Congress shall make no law respecting an establishment of religion..."

for Public Education and Religious Liberty, of which New York PEARL is a constitutent member.

ARGUMENT

A. The Purpose Test

Prior to this Court's decision in McGowan v Maryland, [3] upholding the constitutionality under the First Amendment's Establishment Clause of compulsory Sunday closing laws, the standard of validity was the no-aid-to-religion con-

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3. 366 U.S. 420 (1961).

cept. 4/

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4. It is difficult to uphold the validity of AFLA under that concept, first expressed in Everson v Board of Education, 330 U.S. 1 at 15 (1947) (tax-supported transportation to parochial schools) and later applied in many cases such as McCollum v Board of Education, 333 U.S. 203 at 210-211 (1948) (religious instruction in public schools). In those cases the Court said: "The 'establishment of religion' clause of the First Amendment means at least tnis: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance.

In McGowan the closing words of the Court's opinion read:

> Finally, we should make clear that this case deals only with the constitutionality of §521 of the

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Continuation of footnote 4

No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between church and State.'"

> Maryland statute before us. We do not hold that Sunday legislation may not be a violation of the "Establishment" Clause if it can be demonstrated that its purpose --evidenced either on the face of the legislation, in conjunction with its legislative history, or in its operative effect--is to use the State's coercive power to aid religion. 5/

In Lemon v Kurtzman, 6/ the Court added entanglement to the purpose-effect duality so that it now became the purpose-effect-entanglement trilogy. In the present case the district court ruled that the statute did not violate the purpose aspect of the Lemon v Kurtzman mandate. We submit that, as we will seek to show, it erred in so ruling under the

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5. 366 U.S. at 453 (emphasis added).

6. 403 U.S. 602 (1971).

relevant constitutional law as it then stood. But, perhaps even more important, we submit that even if that were not so, this Court's ruling in the most recent relevant case, Edwards v Aguillard, 7/ handed down on June 19, 1987, mandates a holding that the challenged statute fails under the First Amendment's purpose provision.

B. Religion As an Instrument of Government

The Framers of the Constitution and the First Amendment, were concerned with more than the capture of the state by a church. They were equally alert to the dangers inherent in the manipulation of religion by the government. In

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7. ___U.S.___, 107 S. Ct. 2573 (1987).

prohibiting laws "respecting an establishment of religion," the Framers sought to protect churches from the state as well as the state from the churches.

This twofold aspect of Establishment is presented in James Madison's Memorial and Remonstrance. In opposing a bill to provide public funds to propagate religious teaching, Madison wrote:

> Because the bill implies either that the Civil Magistrate is a competent Judge of Religious truth; or that he may employ Religion as an engine of Civil policy. The first is an arrogant pretension falsified by the contradictory opinions of Rulers in all ages, and throughout the world: The second an unhallowed perversion of the means of salvation. 8 /

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8. Memorial and Remonstrance Against Religious Assessment, par. 5, (1785) reprinted in Everson v Board of Education, 330 U.S. 1, 67 (1947) (Rutledge, J., dissenting).

Use of religion as "an engine of civil policy" is thus as abhorrent to the American tradition as is the use of govrnment as an engine of religious faith or, as in the words of the great nineteenth century jurist Jeremiah S. Black: "The manifest object of the men who framed the institutions of this country, was to have a State without religion and a Church without politics --that is to say, they meant that one should never be used as an engine for the purposes of the other....For that reason they built up a wall of complete and perfect partition between the two." 9 /

The fatal defect of the Adolescent

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9. Essays and Speeches 53 (New York 1885). emphasis added.

Family Life Act is its disregard of this two-fold prohibition. Indeed, the statute is replete with explicit avowals of its intent to use religion as a tool to achieve its goals. In its statement of purpose, the Act avers that the problems it seeks to solve "are best approached through a variety of integrated and essential services provided...by [inter alia]...religious "services encouraged by the Federal Government...should emphasize the provision of support by...[inter alia] religious...organizations..." 11/ This explicit determination to use religion to achieve its goals, we suggest, is an

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11. 42 U.S.C. § 300z(a) (10)(C).

illegitimate statutory purpose under the First Amendment. The court below held that AFLA passed muster under the purpose test because it incorporates some secular values. 12/

But, as the Framers of our Constitution well knew, even obviously unacceptable establishment of one faith as the nation's official religion could be defended by secular arguments. Thus, Blackstone contended that "the preservation of Christianity, as a national religion, is, abstracted from its own intrinsic truth, of the utmost consequence to the civil state," 13/ and

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12. Kendrick v Bowen, 657 F. Supp. 1547 at 1558-60 (1987).

13. 4 W. Blackstone, Commentaries #43.

asserted that "all confidence in human veracity, must be weakened by apostacy, and overthrown by total infidelity." 14/ The encouragement of veracity is undoubtedly a secular goal, but that would not alter the conclusion that a statute enacted to assure "the preservation of Christianity" would have an improper religious purpose. Similarly when the Constitution was being written, secular objectives were advanced to support religious tests for public office. Oliver Ellsworth, later to be Chief Justice of this Court, noted the unacceptable argument "that one who believes these [religious] great truths,

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14. Id. at #44.

will not be so likely to violate his obligations to his country, as one who disbelieves them; we may have greater confidence in his integrity." 15/ Loyalty to one's obligations to the United States is certainly a secular goal; yet relying on a religious oath to achieve that goal violates Article VI (3) of the Constitution and the Establishment Clause of the First Amendment. 16/ So also is assurance that governmental and state employees will be more likely to be honest if they believe in God, for that

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15. Letters from a Landholder No. 7 (1787), quoted in 1 A. P. Stokes, Church and State in the United States 535 (1961).

16. Torcaso v Watkins, 367 U.S. 488 (1961).

is why witnesses at trials say "So help me God."

Here, too, no matter how "secular" the aims of AFLA might be, the calculated intent to use religion to further those aims is an unacceptable purpose under the Establishment Clause. It does not matter that religions choose voluntarily to accept government funds; the state may no more seduce churches to its service than it may compel them. Nor can the statute be saved on the theory that, in the lower court's words, "religious organizations can play a vital role in furthering secular values." 17/ It is one thing to finance secular functions such as curing

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17. 657 F. Supp. at 1559 (1987).

the ill which happen to be performed by religious associations, for they are exactly the same as if they were performed by licensed physicians and nurses in secular hospitals. 18/ But here it is precisely the religious nature of the organizations, and the desire to use their faith and values to further the goals of the statute, that is at the heart of AFLA. Insofar as the Act "employs religion as an engine of civil policy" it violates the First Amendment to the Constitution.

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18. See, e.g., Bradfield v Roberts, 175 U.S. 291 (1899), (hospital corporation organized under the auspices of the Roman Catholic Church is still a secular corporation so long as its activities in caring for the ill are purely secular).

C. Government as an Instrument of Religion

AFLA also falls afoul of the Establishment Clause for its promotion of specific religious doctrines. This is the more familiar facet of the purpose test: the Act is aimed at furthering particular beliefs.

There is no problem here of discovering legislative intent; AFLA is clear on its face. It aims at the "prevention of adolescent sexual activity and adolescent pregnancy," and "emphasize[s] the provision of support by [inter alia]...religious...organizations...in order to help adolescents and their families deal with complex issues of adolescent premarital sexual relations and the consequences of such relations." 19/ Grants are expressly authorized to further these purposes. 20/

We recognize (as did plaintiffs below) that it can be argued that eliminating adolescent sexual activity and pregnancy may have a secular goal as well as a religious one. 21/ That a principle may be endorsed for secular reasons, however, does not transmute the values of those who hold it for religious ones. There is a legally cognizable difference between the rejection of social values by a Thoreau and their rejection by the Old

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19. 42 U.S.C. § 300z(a)(10).

20. 42 U.S.C. § 300z-2.

21. Kendrick v Bowen, 657 F. Supp. at 1559 (1987).

Order Amish. 22/ Similarly, there is a clear difference between the secular arguments for endorsing the goals of AFLA and the religious ones. Financing the former raises no difficulties under the Establishment Clause, but the problems with financing the latter are insuperable.

Thus, for example, AFLA concerns the "prevention of adolescent sexual activity and adolescent pregnancy." 23/ Most religions, however, consider marriage to be a sacrament, and therefore distinguish strongly between premarital and post-marital sexual activity and pregnancy,

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22. See Wisconsin v Yoder, 406 U.S. 205, 216 (1972).

23. 42 U.S.C. § 300z-3(a)(1)(3).

whether by adolescents or others. It is difficult to believe that religious associations, funded by AFLA and assisting adolescents and their families in dealing with these issues, could or would provide purely "secular" counsel unaffected by their doctrinal views of the significance of marriage; their faith would inevitably inform their actions. It follows from this that the intent to finance such actions with public funds has the inevitable and impermissible purpose of advancing religion.

We submit that this Court's decision in Stone v Graham 24/ would require a determination of invalidity in the

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24. 449 U.S. 39 (1980).

present case even if the challenged statute were held not to be violative of the effect-entanglement provisions. In that case, the Court ruled violative of the Establishment Clause's purpose provision a Kentucky statute requiring posting of the Ten Commandments on the wall in each public school classroom in the state. The statute required that

> in small print below the last commandment shall appear a notation concerning the purpose of the display, as follows: "The secular application of the Ten Commandments is clearly seen in its adoption as the fundamental legal code of Western Civilization and the Common Law of the United States. 25/

The Court there acknowledged that

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25. Id. at 39 n. 1.

some of the precepts of the Ten Commandments, such as the prohibitions against murder and stealing, have secular counterparts. But when put forth in a religious form, the purpose was religious, the small print to the contrary notwithstanding. This holding clearly demonstrates that it is the real purpose of a statute, not its formal guise, that is dispositive.

The Court in that case ended its opinion with the following sentence: "We conclude that Ky. Rev. Stat § 158.178 (1980) violates the first part [i.e., the purpose part] of the Lemon v Kurtzman test, and thus the Establishment Clause

of the Constitution." 26/ In the light of that holding the Court found it unnecessary to consider the effect or entanglement aspects of the Establishment Clause.

The importance of looking to the true purpose of a statute is well ex hibited in the case of AFLA. Prior to AFLA's enactment in 1981, 27/ There already was a law designed to deal with adolescent pregnancies in a purely secular fashion. 28/ The major change made

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26. Id. at 42-43 (footnote omitted.)

27. Pub. L. 97-35, Title 20, 95 Stat. 578 (1981).

28. Pub. L. 95-626, Title 6, 92 Stat. 3595 (1978).

in the 1981 version was to provide for the involvement of religious organizations. In evaluating the purpose of the religious grants in AFLA, therefore, it is this change, and not the reenactment of the earlier law, which is crucial.

Also relevant to a determination of Establishment Clause violation by reason of purpose is the Court's decision in Epperson v Arkansas. 29/ There it held unconstitutional a statute making it unlawful for public school teachers "to teach the theory or doctrine that mankind ascended or descended from a lower order of animals" or to use textbooks that teach that doctrine.

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29. 393 U.S. 97 (1968).

In reaching that decision it quoted the statement from the Schempp decision [30] that the Establishment Clause renders unconstitutional any statute that has as its purpose or effect the advancement or inhibition of religion. The antecedent of the Arkansas statute, the Court said, was the Tennessee "monkey law," which "candidly stated that its purpose was to make it unlawful to teach any theory that denies the story of the Divine creation of man as taught in the Bible, and to teach instead that man has

30. Id. at 107, quoting Abington School District v Schempp, 374 U.S. 203, 222 (1963).

descended from a lower order of animals."

"Perhaps," the Court there continued, "the sensational publicity attendant upon the Scopes trial induced Arkansas to adopt less explicit language. It eliminated Tennessee's reference to 'the story of the Divine Creation of man' as taught in the Bible, but there is no doubt that the motivation [i.e. purpose] of the law was the same: to suppress the teaching of a theory, which it was thought 'denied' the divine creation of man." [31]

No less relevant to the case before this Court is that of Karcher v May. [32] It involved a challenge

31. 393 U.S. at 107.

32. 572 F. Supp. 1561 (...1983).

under the Establishment Clause of a New Jersey statute providing that principals and teachers in public elementary and high schools should "permit students to observe a one-minute period of silence to be used solely at the discretion of the individual student, before the opening exercise of each school day for quiet and private contemplation or introspection."

The district court had held that the statute violated the Establishment Clause because its purpose was religious rather than secular, because it both advanced and inhibited religion, and because it fostered excessive government entanglement with religion. The court of appeals, in affirming the decision, held thathe statute did not promote or

inhibit religion and would not foster excessive entanglement between government and religion, but affirmed the district court's conclusion that the statute violated the Establishment Clause for lack of a valid secular purpose. 33/ This Court's most recent determination relating to purpose is found in Edwards v Aguillard 34/ handed down in June of 1987. The issue in that case was the constutionality under the Establishment Clause of a Louisiana law that forbade the teaching of the theory of evolution in public elementary and secondary

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33. May v Cooperman, 780 F. 2d 240 (3rd Cir. 1985); appeal dismissed for want of jurisdiction, sub non Karcher v May, ___ U.S. ___, 108 S. Ct. 388 (1987).

34. ___ U.S. ___, 107 S. Ct. 2573 (1987).

schools unless it was accompanied by instruction in the theory of creationism. The statute was officially entitled "Balanced Treatment of Creation-Science and Evolution-Science Act," but was popularly known as the "Creationism Act" just as the statute in the present case is known to many as the "Chastity Law," and so too, as in the present case, it determined the issue on a motion for summary judgment. There are other similarities between the two cases, but our concern in this brief relates only to the correctness of the district court's ruling on the applicability of the purpose aspect of the purpose-effect-entanglement test in determining validity or invalidity under the First Amendment's

Establishment Clause. Because it is so much in point, and because it was decided after the district court handed down its decision in the present case, we take the liberty of quoting somewhat substantially from the Edwards opinion:

> While the Court is normally deferential to a State's articulation of a secular purpose, it is required that statement of such purpose be sincere and not a sham in Wallace [v Jaffree]: "It is not a trivial matter, however, to require that the legislature manifest a secular purpose and omit all sectarian endorsements from its laws. That requirement is precisely tailored to the Establishment Clause's purpose of assuring that Government not intentionally endorse religion or a religious practice."...
>
> These same historic and contemporaneous antagonisms, between the teachings of certain religious denominations and the teaching of evolution are present in this case. The preeminent purpose of the Louisiana legis-

lature was clearly to advance the religious viewpoint that a supernatural being created humankind. The term "creation science" was defined as embracing this particular religious doctrine by those responsible for the passage of the Creationism Act....

In this case, the purpose of the Creationism Act was to restructure the science curriculum to conform with a particular religious viewpoint. Out of many possible science subjects taught in the public schools, the legislature chose to affect the teaching of the one scientific theory that historically has been opposed by certain religious sects. As in Epperson, the legislature passed the Act to give preference to those religious groups which have as one of their tenets the creation of humankind by a divine creator. The "overriding fact" that confronted the Court in Epperson was "that Arkansas' law selects from the body of knowledge a particular segment which it proscribes for the sole reason that it is deemed to conflict with...a particular interpretation of the Book of Genesis by a particular religious group." Similarly, the

Creationism Act is designed either to promote the theory of creation science which embodies a particular religious tenet by requiring that creation science be taught whenever evolution is taught or to prohibit the teaching of a scientific theory disfavored by certain religious sects by forbidding the teaching of evolution when creation science is not also taught. The Establishment Clause, however, "forbids alike the preference of a religious doctrine or the prohibition of theory which is deemed antagonistic to a particular dogma." Because the primary purpose of the Creationism Act is to advance a particular religious belief, the Act endorses religion in violation of the First Amendment. 35/

It is obvious that the present case has important features in common with these earlier decisions. The focus of AFLA, as in the earlier cases, is on

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35. Id. at 2579, 2581-82 (emphasis added) (footnotes omitted).

children, who are more susceptible to the induction of religious values than older persons. 36/ Moreover, as in the earlier cases, ostensible references to secular purposes in other parts of the law do not disguise the essentially religious nature of the challenged part of the statute.

The court below did not have the benefit of the Edwards decision. For the rest, it rejected the controlling precedents because "at most, only the language permitting the involvement of religious organizations was motivated by religious considerations. This, however, does not mean that the entire AFLA was

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36. See id. at 2577.

motivated wholly by religious considerations, as it would have to be in order to find that the AFLA has no valid secular purpose." 37/ But, we submit, if the involvement of religious institutions had as its purpose the advancement of religious doctrines, as it necessarily did, then those provisions are constitutionally infirm, regardless of the motivation behind other parts of AFLA. The fact that Commandments VI through X of the Ten Commandments are purely secular, did not make constitutional the posting of all ten in the public schools. 38/ The strictures

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37. 657 F. Supp. at 1559 (emphasis in original).

38. Stone v Graham, 449 U.S. 39 (1980).

of the First Amendment, we submit, are not so easily evaded.

Finally, we submit that invalidation of 42 U.S.C. § 300z-300z(10) at least insofar as it involves religious institutions, 39/ is required if its purpose was to advance some religions and not others. The Court's reference to "certain religious sects" in Edwards in the quoted paragraph indicates this quite clearly. The fact that three of the eight plaintiffs in the present case are themselves clergymen whose conscience impelled them not only to refrain from participating as a beneficiary in the

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39. We take no position as to the possible severabiliy of the religion provisions so as to avoid a judgment invalidating the entire statute.

statutary distribution of federal funds, but to oppose its enactment (a fact well known to Congress when the measure was under consideration) requires a determination that the statutory purpose was to aid "certain religious sects" against the conscience of others.

CONCLUSION

For the foregoing reasons, AFLA violates the purpose test of the Establishment Clause of the United States Constitution, and the decision of the lower court should be affirmed on that ground as well as the effect and entanglement grounds.

Respectfully submitted,

LEO PFEFFER
29 Ridge Terrace
Central Valley, N.Y. 10917
Attorney for Amicus Curiae

February, 1988

APPENDIX

American Ethical Union
Americans for Democratic Action
Americans for Religious Liberty
Aspira
Association of Reform Rabbis of New York City and Vicinity
B'nai B'rith
Community Church of New York
Council of Churches of the City of New York
Council of Supervisors and Administrators
Episcopal Diocese of L.I., Committee on Social Concerns and Peace
Humanist Society of Greater New York
Jewish War Veterans, New York Department
Monroe Citizens for Public Education and Religious Liberty
National Service Conference of The American Ethical Union
New York Civil Liberties Union
New York Federation of Reform Synagogues
New York Jewish Labor Committee
New York Conference of the Society for Ethical Culture
New York Society for Ethical Culture *
New York State Congress of Parents and Teachers
New York State United Teachers
Public Education Association
Union of American Hebrew Congregations, New York State Council
United Americans for Public Schools
United Community Centers

United Federation of Teachers
United Parents Association
United Synagogue of America, New York
Metropolitan Region
Women's City Club of New York
Workmen's Circle, New York Division

* American Humanist Association, though not a member of NY Pearl, joins in the submission of this brief.

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Nos. 87-253, 87-431, 87-462, and 87-775

IN THE

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OCTOBER TERM, 1987

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, *Appellant*,
v.
CHAN KENDRICK, et. al., *Appellees*.

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v.
CHAN KENDRICK, et. al., *Appellees*.

CHAN KENDRICK, et. al., *Cross-Appellants*,
v.
OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, *Cross-Appellees*.

UNITED FAMILIES OF AMERICA, *Appellant*,
v.
CHAN KENDRICK, et. al., *Appellees*.

On Appeal From The United States District Court For The District Of Columbia

BRIEF OF COUNCIL ON RELIGIOUS FREEDOM AS *AMICUS CURIAE* IN SUPPORT OF APPELLEES AND CROSS-APPELLANTS

Of Counsel:
ROBERT W. NIXON
6840 Eastern Avenue, NW
Washington, DC 20012
HAROLD J. L'NCE
204 N. San Antonio Ave.
Ontario, CA 91762
ROLLAND TRUMAN
4522 Greenmeadow Road
Long Beach, CA 90808

LEE BOOTHBY
Counsel of Record
JULIE B. KAPLAN
BOOTHBY, ZIPRICK & YINGST
208 W. Mars Street
Berrien Springs, MI 49103
(616) 471-7787
Counsel for Council on Religious Freedom, *Amicus Curiae*

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v.
CHAN KENDRICK, et. al., *Appellees*.

CHAN KENDRICK, et. al., *Cross-Appellants*,
v.
OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, *Cross-Appellees*.

UNITED FAMILIES OF AMERICA, *Appellant*,
v.
CHAN KENDRICK, et. al., *Appellees*.

On Appeal From The United States District Court For The District Of Columbia

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BRIEF OF COUNCIL ON RELIGIOUS FREEDOM AS *AMICUS CURIAE* IN SUPPORT OF APPELLEES AND CROSS-APPELLANTS

STATEMENT OF INTEREST

The Council on Religious Freedom is a nonprofit corporation which was formed to uphold and promote the principles of religious liberty. Its Board of Directors is composed of individuals who are active in religious affairs, some in an official capacity, and some on a lay basis; but all

recognize the importance of preserving the principles embodied in the Religion Clauses of the First Amendment. Members of the organization reside throughout the United States and share these concerns.

The issues raised in this case are of particular concern because of the far-reaching implications that may flow if this Court were to sustain the constitutionality of including religious organizations as recipients of tax-derived grants for activities which contemplate counseling with adolescents on matters of moral and religious concerns. The Council also believes that any retreat by this Court from its holding in *Flast* v. *Cohen*, 392 U.S. 83 (1968), would seriously threaten the Establishment Clause guarantees.

SUMMARY OF ARGUMENT

The Adolescent Family Life Act ("AFLA"), on its face, calls for the involvement of religious organizations in carrying out the statute's mandates. As such, without inquiring into the specific religiosity of each institution, the Court should recognize the inherently religious nature of such institutions, and their concomitant potential to use government aid impermissibly to foster their particular religious beliefs and practices. If the sponsored activity is one in which the religious institution would be likely to inculcate religion, then the statute, on its face, violates the Establishment Clause.

Amicus has argued, and the evidence from the grantees has demonstrated, that religious institutions, when carrying out the activity sponsored by the AFLA, are likely to inculcate their religious beliefs. The activity—counseling—is a one-on-one relationship during which the counselor has ample opportunity to transmit religious beliefs. The subject matter—abortion and premarital sex

—is one about which religions hold fundamental beliefs. The authority over the activity is held by religious institutions, whose influence is likely to be felt by both the counselors and the clients. Such an impermissible potential to inculcate a grantee's religious beliefs, in and of itself, violates the Establishment Clause.

Appellant Federal Government contends in its brief that the taxpayer-appellees do not have standing to litigate any claim against the application of the statute. *Amicus* contends that *Flast* v. *Cohen*, 392 U.S. 83 (1968), clearly establishes that appellees not only have standing to facially attack the statute, but also have standing to seek to overturn the application of the statute.

ARGUMENT

I. AFLA, ON ITS FACE, PROVIDES FOR DIRECT INVOLVEMENT OF RELIGIOUS ORGANIZATIONS; SUCH A PROVISION IS INHERENTLY LIKELY, UNDER ESTABLISHMENT CLAUSE PRINCIPLES, TO FOSTER RELIGION.

The Adolescent Family Life Act requires its grantee applicants to describe how they "will, as appropriate in the provision of services . . . *involve* . . . *religious* and *charitable organizations* . . .." 42 U.S.C. § 300z-5(a)(21) (1982) (emphasis added), in carrying out their care and/or prevention services. 42 U.S.C. §§ 300z-2, 300z-5(a) (1982). *Webster's New World Dictionary* defines the term "religious" as: "1. Characterized by adherence to religion or a religion; devout; pious; Godly. 2. Of, concerned with, appropriate to, or teaching religion . . .." *Webster's New World Dictionary* (2d Ed. 1986). *American Jurisprudence*, under "religious society," defines a "religious or church society" as

> A voluntary *organization* whose members are associated together not only for religious exercises, but also for the purpose of maintaining and supporting its ministry, providing the convenience of a church home, and promoting the growth and efficiency of the work of the general church of which it forms a coordinate part.

66 *American Jurisprudence* § 1 (2d Ed. 1973) (footnotes omitted) (emphasis added).

A. No Case-By-Case Judicial Inquiry Is Necessary to Determine That Religious Organizations Are Religious.

The fact that religious organizations are religious should be self-evident. Courts should not have to involve themselves in answering the question of whether religious organizations are religious. Such a position represents both a constitutionally prudent and a common sense approach that recognizes that any organization which defines itself as religious has an extreme likelihood of being religious. Professor Donald A. Giannella has aptly articulated the value of adopting a broad, versus a case-by-case approach, to the question of whether a religious organization is religious. His objections to a case-by-case approach are applicable to this case. He describes the Supreme Court's approach toward *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971), *Robinson* v. *DiCenso*, 403 U.S. 602 (1971), and *Tilton* v. *Richardson*, 403 U.S. 672 (1971):

> The Court elected to use a broad-brush technique in picturing the nature of church-related schools at both the lower and higher levels of education. In this way it could make judgments that would have a more or less conclusive effect with regard to institutions not before it . . .

> A broad approach . . . avoids burdensome and embarrassing problems for the judiciary. It eliminates the need of a case-by-case determination of which schools are too religious to receive aid without close supervision and which are not. Such a case-by-case approach would cause problems. First, the determination of different degrees of religiosity would involve the judiciary in just the kind of entanglement that the Court presumably was trying to avoid. Second, if a highly refined and particularistic test were adopted, some schools and religions would inevitably register plausible complaints of invidious discrimination or lack of equal treatment as the dividing line was etched out case-by-case. The *Horace Mann* decision provides an illustration of how a highly particularistic approach operates. In that case, the Maryland Court of Appeals struck down state grants to three church-related colleges but upheld one to a fourth institution on the ground that this school did not have a "fervent, intense, or passionate interest in religion." When judicial decisions turn on such "elusive" and "ephemeral" matters concerning religion, entanglement seems excessive and equal treatment of religions and schools is seriously endangered.

Giannella, *Lemon and Tilton: The Bitter and the Sweet of Church-State Entanglement*, 1971 Sup. Ct. Rev. 147, 181.

This Court has also recognized the First Amendment problems implicit in a case-by-case determination of an institution's religiosity. In assessing a statute which may have required "a detailed audit in the Court of Claims to establish whether or not the amounts claimed [by the nonpublic school] for mandated services constitute a furtherance of the religious purposes of the claimant," *New York* v. *Cathedral Academy*, 434 U.S. 125, 131-32, (1977) (citations omitted), the Supreme Court stated:

> But even if such an audit were contemplated, we agree with the appellant that this sort of detailed

> inquiry into the subtle implications of in-class examinations and other teaching activities would itself constitute a significant encroachment on the protections of the First and Fourteenth Amendments. In order to prove their claims for reimbursement, sectarian schools would be placed in the position of trying to disprove any religious content in various classroom materials. In order to fulfill its duty to resist any possibly unconstitutional payment, . . . the State as defendant would have to undertake a search for religious meaning in every classroom examination offered in support of a claim. And to decide the case, the Court of Claims would be cast in the role of arbiter of the essentially religious dispute.
>
> The prospect of church and state litigating in court about what does or does not have religious meaning touches the very core of the constitutional guarantee against religious establishment, and it cannot be dismissed by saying it will happen only once . . .

Id. at 132-33.[1] *See also Aguilar* v. *Felton*, 473 U.S. 402, 413-14 (1985) (describing Establishment Clause problem of state agents making judgments concerning "matters that may be subtle and controversial, yet may be of deep religious significance to the controlling denominations" as both potentially politically divisive and "'rais[ing] more than an imagined specter of governmental secularization of a creed.'"). As the above demonstrates, adopting a *per se* rule that religious institutions are religious is consistent with the First Amendment's preference to avoid either requiring religious authorities to prove that their activities are religious or secular, or requiring secular authorities to resolve the same question.

[1] *Cf. Catholic Bishop of Chicago* v. *NLRB*, 559 F.2d 1112 (7th Cir. 1977), *aff'd.*, 440 U.S. 490 (1979) ("The determination that an institution is so completely a religious entity as to exclude any viable secular components obviously implicates very sensitive questions of faith and tradition. *See, e.g., Yoder, supra*, 406 U.S. 205, 92 S.Ct. 1526, 32 L. Ed.2d 15. At some point, factual inquiry by courts or agencies into such matters would almost necessarily raise First Amendment problems.").

This Court recognizes that categorizing certain schools as sectarian may not take into consideration the fact that "the degree of sectarianism differs from school to school," *Aguilar*, 473 U.S. at 412, n. 8, but believes that this "has little bearing on [the Court's] analysis . . .. [E]nforcement of the Establishment Clause does not rest on means or medians. If any significant number of the Title I schools create the risks described in *Meek*, *Meek* applies . . .'" *Id.* (quoting Judge Friendly's opinion in the court below, 739 F.2d at 70). *See also Public Funds for Public Schools* v. *Marburger*, 358 F.Supp. 29, 34 (D. N.J. 1973), *aff'd*, 417 U.S. 961 (1974)[2] (concluding, based on the Supreme Court's recognition that "'the *raison d'etre* of parochial schools is the propagation of religious faith,'" *Lemon*, 403 U.S. at 628 (Douglas, J., concurring), that nonpublic schools which have participated in program are, and will be, for the most part, church-related or religiously-affiliated educational institutions).

B. Programs Which Sponsor Activity Within Religious Organizations Are More Likely to Advance Religion.

An analysis of this statute's constitutionality must first recognize the Establishment Clause consequences of the fact that religious organizations are, by their very nature, formed to support religious ministry and "promot[e] the growth and efficiency" of the "church of which it forms a

[2] This Court's "affirmance of the result in *Marburger* was a decision on the merits, entitled to precedential weight." *Meek* v. *Pittenger*, 421 U.S. 349, 366 n.16 (1975).

coordinate part." 66 *American Jurisprudence* § 1 (2d Ed. 1973). Prior cases demonstrate that government sponsorship of programs within institutions of a religious nature can be itself determinative of an unconstitutional advancement of religion. *Compare Meek* v. *Pittenger*, 421 U.S. 349, 363 (1975) ("because of the predominantly religious character of the schools benefiting from the Act," "the direct loan of instructional material and equipment has the unconstitutional primary effect of advancing religion"); *and Hunt* v. *McNair*, 413 U.S. 734, 743 (1973) (when aid earmarked for secular purposes flows to institutions where a "substantial portion of its functions are subsumed in the religious mission," state aid has the impermissible effect of advancing religion) *with Wolman* v. *Walter*, 433 U.S. 229, 247-49, (1977) (offering therapeutic and remedial services by public employees "under circumstances that reflect their religious neutrality," will not have the impermissible effect of advancing religion). *See also Aguilar* v. *Felton*, 473 U.S. 402, 412 (1985) (program combining aid to pervasively sectarian institutions with aid in the form of teachers, violates the Establishment Clause).

II. NOTHING IN THE STATUTE INSURES A RELIGIOUS ORGANIZATION WILL NOT USE TAX FUNDS TO INCULCATE RELIGION.

When the state subsidizes an activity, such as counseling, it "must be certain, given the Religion Clauses, that subsidized [counselors] do not inculcate religion." *Meek*, 421 U.S. 371 (recognizing that "a state-subsidized guidance counselor is surely as likely as a state-subsidized chemistry teacher to fail on occasion to separate religious instruction and the advancement of religious beliefs from his secular education responsibilities."). There is nothing, however, in the statute to insure that the religious organization/grantee will not use the aid to inculcate religion.

There is no requirement that services be provided on religiously neutral territory. *Cf. Meek*, 421 U.S. at 371. *See also Wolman*, 433 U.S. at 247. Nor is there a requirement that the grantees use materials prepared by secular authorities. *Levitt* v. *Committee for Public Education*, 413 U.S. 472 (1973). Nor is there any requirement that the counselors be religiously neutral in their approach or not be under the control of religious authorities. *Id.* at 480.[3]

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[3] Religious organizations, because of the Religion Clauses of the First Amendment, are afforded special protection. *Serbian Eastern Orthodox Diocese* v. *Milivojevich*, 426 U.S. 696 (1976); *Kedroff* v. *St. Nicholas Cathedral*, 344 U.S. 94 (1952). This includes protection against the government interfering with the selection of employees that are involved in transmitting the organization's teachings and beliefs. *Rayburn* v. *General Conference of Seventh-day Adventists*, 772 F.2d 1164 (4th Cir. 1985).

In addition, in recognition of free exercise concerns, the Congress has exempted religious organizations from Title VII's prohibition against discrimination in employment because of religion. 42 U.S.C. § 2000e-1. *See also Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints* v. *Amos*, 107 S.Ct. 2862 (1987).

AFLA, however, provides for the payment of funds to these same religious organizations which have a constitutional and statutory right to discriminate on the basis of religion in employment matters. There is no waiver of these constitutional or statutory protections under AFLA. Justice White has noted that legislation providing assistance to sectarian schools, which restricts entry on religious grounds, would, to that extent, be unconstitutional. *Lemon* v. *Kurtzman*, 403 U.S. 602, 671, n. 2 (1971) (White, J., dissenting). This same reasoning should apply to religious organizations that hire counselors and pay them with tax-derived funds and at the same time enjoy the right to discriminate on the basis of religion as to hiring and other employment-related actions.

III. ONCE A STATUTE REQUIRES INVOLVEMENT OF RELIGIOUS ORGANIZATIONS, ITS CONSTITUTIONALITY DEPENDS ONLY ON WHETHER THE ACTIVITY IS OF A TYPE THAT ENTAILS RISK OF INCULCATING RELIGION.

The constitutionality of a statute, that on its face allows for the involvement of a religious organization in a governmental program, depends upon the type of government sponsored activity which the statute contemplates. If the statute contemplates sponsoring an activity in which there is a significant risk of governmental aid being used to inculcate religion, then such a statute offends the Establishment Clause. *Lemon*, 403 U.S. at 619-20 (presence of "potential for impermissible fostering of religion," which can be eliminated only by comprehensive, discriminating, and continuing state surveillance conflicts with the Religion Clauses.). Only when there is no such risk, as when the state provides services to religious institutions, "in common to all citizens [that] are so separate and so indisputably marked off from the religious function,' . . . that they may fairly be viewed as reflections of a neutral posture toward religious institutions," *Wolman*, 433 U.S. at 251 n. 18 (citations omitted), is such aid permissible. The program in this case, however, does not conform to such a constitutionally permissible characterization. It conforms, rather, to characterizations of constitutionally impermissible programs.

A. Factors that Create Constitutionally Impermissible Risk of Inculcating Religion

This Court considers a number of factors in determining whether a sponsored activity is the type that creates this impermissible risk of inculcating religion. The first concerns whether the state has involved religious organizations in ideological activities that are related to the

religion-oriented function of the organization. *Meek*, 421 U.S. at 364 (teaching involves religious values and beliefs). This, the state is not permitted to do, because involving ideological material in an activity creates an opportunity for the actor to transmit ideological views. *Levitt* v. *Committee for Public Education*, 413 U.S. 472, 480 (1973) ("substantial risk that these examinations, prepared by teachers, under the authority of religious institutions, will be drafted with an eye, unconsciously or otherwise, to inculcate students in the religious precepts of the sponsoring church."); *Meek*, 421 U.S. at 366 ("the teaching process, to a large extent, is devoted to the inculcation of religious values and beliefs"), *Wolman*, 433 U.S. at 247 (therapist's relationship with pupil provides "opportunities to transmit ideological views" which creates danger of advancing religion, when therapy is conducted in non-neutral environment); *Id.* at 244 (distinguishing diagnostic services from counseling and teaching on the basis that the former "have little or no educational content and are not closely associated with the educational mission of the nonpublic school").

This Court also considers whether religious or secular authorities control those involved in the sponsored activity. *Compare Wolman*, 433 U.S. at 240, ("The nonpublic school does not control the content of the test or its result. This serves to prevent the use of the test as a part of religious teaching, and thus avoids that kind of direct aid to religion found present in *Levitt*. Similarly, the inability of the school to control the test eliminates the need for supervision that gives rise to excessive entanglement."); *and Meek*, 421 U.S. at 371 (recognizing that in this case, "auxiliary-services personnel, because not employed by the nonpublic schools, are not directly subject to the discipline of a religious authority.") *with Levitt*,

413 U.S. at 480, (recognizing that teachers who prepare tests under authority of religious institutions are more likely to inculcate religion); *and Lemon*, 403 U.S. at 617 ("We cannot ignore the danger that a teacher under religious control and discipline poses to the separation of the religious from the purely secular aspects of precollege education.").

Likewise relevant to this Court's determination of the risk of the government sponsored activity inculcating religion is the relationship between those carrying out the program and the recipients of the program. This Court has noted that the relationship between counselor and student provides an opportunity for the transmission of sectarian views, beyond that provided in the constitutionally permissible relationship between diagnostician and the pupil. *Wolman*, 433 U.S. at 244. *See also Wamble* v. *Bell*, 598 F.Supp. 1356, 1371 (W.D. Mo. 1984) ("teachers are afforded a unique opportunity to form substantial and enduring relationships with students and to transmit ideological views.").

Based upon the above-described factors, it is clear that the AFLA program involves a significant risk that government funds—taxpayers' dollars—will be used to inculcate religion. The statute permits religious organizations to be grantees and envisions a direct role for those organizations in the education and counseling components of AFLA grants. *See* 42 U.S.C. § 300z-5(a)(21)(B); *id.* at §§ 300z-1(a)(4)(A), (B), (D), (H), (L), and (M) (seven of seventeen listed services explicitly involve "education" or "counseling."). As the district court found, the grantee's functions

> . . . amount to *teaching* by . . . religious organizations, about the harm of premarital sexual relations and the factors supporting a choice of adoption rather than abortion, and these matters are fundamental elements of religious doctrine. Moreover, the AFLA contains no restriction whatsoever against the teaching of religion *qua* religion or any attempt to use the education and counseling process to "intentionally or inadvertently" inculcate religious belief.

Kendrick v. *Bowen*, 657 F.Supp. 1547, 1562-63 (D. D.C. 1987) (emphasis in original).

Thus, the AFLA offends all of the factors discussed above: The activity involves teaching and counseling, which provides the opportunity to transmit sectarian views; the material involves fundamental elements of religious doctrine; and the religious institutions can control the program. The district court recognized: "[B]y contemplating the provision of aid for the purpose of encouraging abstinence and adoption to organizations affiliated with these religions [which hold as a fundamental tenet that premarital sex and abortion are wrong, even sinful], the AFLA contemplates subsidizing a fundamental religious mission of those organizations." *Id.* at 1563. A program of this nature inherently has a great potential for the diversion of secular funds to the inculcation of religious values and beliefs. *Amicus* submits that this program can be accurately characterized, as the court characterized the *Levitt* case, where "there was an impermissible risk of religious indoctrination inherent in some of the required services themselves," which rendered the program constitutionally invalid. *Cathedral Academy*, 434 U.S. at 131.

B. The Evidence Demonstrates AFLA Grantees Have Inculcated Religion as Part of Their Programs.

The materials produced by AFLA grantees evidence the reality of the risk that grantees will use the government sponsored program to inculcate their religious

beliefs. The material from one grantee, the Pregnancy Distress Center (PDC), demonstrates how this grantee is advancing religion in its AFLA program. The PDC material for counselor training instructs trainees when counseling a client who has had a negative pregnancy test, "If appropriate, [to] share God's plan for sex in marriage . . .. Help *create* a dream for the client if there is not one there to re-awaken." (L.D. 57)[4] The counselor is also to address "'deeper problem solving,'" which is to include: "How could [the client] deepen relationships with others and with God?" *Id.*

The material the PDC provides to pregnant teenagers includes abundant references to religion and encouragement on the basis of "God's plan" for the teenager not to terminate the pregnancy:

> Your choice to give another human being a chance at life is in keeping with God's plan. You might believe your pregnancy is a stumbling block. But God desires to turn your experience into a stepping stone toward Him.
>
> Did you know that Psalm 139 applies to *both* you and your baby?
>
> > You made all the delicate, inner parts of my body and knit them together in my mother's womb. Thank You for making me so wonderfully complex! It is amazing to think about. Your workmanship is marvelous—and how well I know it . . .. You saw me before I was born and scheduled each day of my life before I began to breathe. Every day was recorded in Your Book! (Psalm 139:13-16)

[4] "L.D. #" refers here, and in the upcoming paragraphs, to the page number of the "Lodged Documents" submitted to this Court by the National Organization of Women, Legal Defense and Education Fund, in connection with their *amicus* brief in this case.

> Did you discover the significant words? *He saw us before we were even born!* Mindboggling, isn't it? God is keenly aware of our situation. He isn't just standing around watching it happen!
>
> . . . [God] promises He will be right in the cyclone with us. "I am with you *always*, even to the end of the world." (Matthew 28:26) From the moment you chose to carry your baby full-term God chose to bless you because of your refusal to tamper with someone else's life.

(L.D. 41-42) (emphasis in original).

This material also includes "an example of the kind of prayer you might pray if you want to accept Jesus Christ as your Lord and Savior."

> Lord, I bring you my sinful nature as you've revealed it to me. I know I don't have anything valuable to offer except myself and my love. I can't earn your forgiveness, but you've offered it as a free gift from your Son, Jesus Christ. I accept your control of my life, and intend to serve you, obey you and follow you from this moment forward. You have my past, my present, my future, my family, my child, my money and my time. Nothing will I withhold. Thank you for loving me and forgiving me and making me your own. Amen.

(L.D. 42).

The material from the Pregnancy Problem Center, another grantee, seeks "volunteers, prayers, and financial help," urging that "The child of the silent scream [referring to title of an anti-abortion movie] is your brother in Christ. His mother is your sister. Their cries go out to you." (L.D. 65) The group, the material advertises, is "seeking 7 people to pray each day for one hour for our work . . .. Prayers could be done in church, at home, or within a prayer group." *Id.* This grantee likewise includes

in its material a "Prayer at an Abortion Chamber," which includes the following language:

> Father I come to this place as to a new Calvary. I wish to stand here with Mary and those others who stood by the Cross of Jesus the day he sacrificed Himself for us sinners.
>
> I firmly believe the sorrowful scene before my eyes is nothing less than a reenactment of Jesus' suffering and death, already anticipated in the massacre of the Innocents of Bethlehem and repeated in the slaughter of these least brethren of His, the tiny children brought here for killing.
>
> O Father, I realize I cannot stop the killing of most of these children, any more than Mary could have the slaying of her Child that day. I unite my heart to hers in faith and grieving love and humbly adore your divine purpose in allowing such bloodshed. I offer you the blood of Jesus and, mingled with it, the blood of these little ones, the abortionists, and our whole society. Please remember Jesus' own prayer from the Cross with its echo in Mary's heart: "Father, forgive them for they know not what they do."

(L.D. 66)

The Christian Family Care Agency also involves religion in its advertisements for its services: "Through our adoption services, healthy Christian families are carefully screened . . .." These materials include numerous quotes from the *Bible* which are used to support the agency's actions. For example, the above advertisement for adoption services is followed by "The Christian who is pure and without fault from God the Father's point of view is the one who takes care of orphans . . .. James 1:27." (L.D. 8)

The above material substantiates *amicus*' argument that the risk that grantees will use government funds to

support their religious positions is inherent in the AFLA. It is clear from these quotes that these religious institutions/grantees have done precisely this.

IV. REVENTING THE RISK THAT TAX SUPPORTED ACTIVITY WILL BE USED TO INCULCATE RELIGION WOULD CONSTITUTE ENTANGLEMENT BETWEEN CHURCH AND STATE.

When the potential for impermissible fostering of religion is present, "[t]he State must be certain, given the Religion Clause, that subsidized [counselors] do not foster religion." *Earley* v. *DiCenso*, 403 U.S. at 618-19. However, in the context of the state-subsidized teaching and counseling by religious organizations,

> A comprehensive, discriminating, and continuing state surveillance will inevitably be required to ensure that . . . the First Amendment . . . is . . . respected. Unlike a book, [however] a [counselor] cannot be inspected once so as to determine the extent and intent of his or her personal beliefs and subjective acceptance of the implications imposed by the First Amendment. These prophylactic contacts will involve excessive and enduring entanglement between state and church.

Lemon, 403 U.S. at 619. *See also Aguilar*, 473 U.S. at 410; *Meek*, 421 U.S. at 352-53; *Marburger*, 358 F.Supp. at 36-37, *aff'd*, 417 U.S. 961 (excessive entanglement would result from attempt to police use of material and equipment that were readily divertible to religious uses).

Thus, the excessive entanglement between government and religion that would be fostered by an attempt to monitor the program demonstrates the statute's unconstitutionality under the Establishment Clause.

V. THE STATUTE'S ENDORSEMENT OF RELIGION OFFENDS THE ESTABLISHMENT CLAUSE.

Government legislation that "endors[es] a particular religious belief or practice that all citizens do not share," offends the Establishment Clause. *Wallace* v. *Jaffree*, 472 U.S. 38, 76 (1985) (O'Connor, J., concurring). The religious belief that abortion and premarital sex are wrong is not a belief shared by all citizens. If an "objective observer, acquainted with the text, legislative history, and implementation of the statute, would perceive it as a state endorsement" of a particular religious belief or practice, then that statute cannot pass Establishment Clause scrutiny. *Id.*

The AFLA clearly sends a message of endorsement relative to those religious organizations that embrace religious tenets that premarital sex and abortion are wrong or sinful. Such a statute offends the Establishment Clause because it "sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community." *Lynch* v. *Donnelly*, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring). As Justice O'Connor explains: A state endorsement of a particular religious belief or practice "infringes the religious liberty of the nonadherent, for '[w]hen the power, prestige, and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain.'" *Wallace*, 472 U.S. at 70, *quoting Engel* v. *Vitale*, 370 U.S. 421, 431 (1962).

When an adolescent is counseled by an AFLA counselor, on the premises of a religious organization, about a matter which she knows to be a fundamental tenet of the

same religious organization, she would likely perceive that the state was endorsing a particular religious belief and practice. The adolescent who supports these beliefs would feel herself to be an insider, a favored member of the political community. The adolescent who opposes the beliefs would sense herself to be an outsider, only a partial member of the political community. The individual being counseled would likewise closely identify the government's power with the particular religious institution where the counseling occurs, and with the particular doctrine advocated. Such an appearance constitutes government promotion of religion. *Grand Rapids School District* v. *Ball*, 473 U.S. 373, 389 (1985). Children in their formative years are particularly vulnerable to perceiving such a symbolic union between church and state. *Id.* at 390.

VI. APPELLEES HAVE FEDERAL TAXPAYER STANDING TO CHALLENGE THE APPLICATION OF AFLA.

In this case the defendant and defendant-intervenors did not contest plaintiffs' standing to challenge the constitutionality of the AFLA on its face but contended that plaintiffs did not have taxpayer standing to challenge the Act as applied. *Kendrick* v. *Bowen*, 657 F.Supp. 1547, 1554 (D. D.C. 1987).

The Secretary, in his brief before this Court again raised the standing issue stating that "the district court erred when it held . . . that appellees have standing as federal taxpayers to challenge the statute as applied." Brief for Secretary Appellant at 31 n. 24. The Secretary makes this claim on its distorted reading of *Valley Forge Christian College* v. *Americans United for Separation of Church and State*, 454 U.S. 464 (1982). The Secretary

argues that "[j]ust as the plaintiffs in *Valley Forge* lacked standing to challenge 'a decision by HEW to transfer a parcel of federal property' . . . so, too, do appellees lack standing to challenge the individual spending decisions made by the Secretary in implementing the AFLA." Brief for Secretary Appellant at 31 n. 24.

This Court ruled in *Flast* v. *Cohen*, 392 U.S. 83 (1968), that federal taxpayers have standing based on their status as such to challenge legislation when they meet the following two-part test:

> First, the taxpayer must establish a logical link between that status and the type of legislative enactment attacked . . .. Secondly, the taxpayer must establish a nexus between that status and the precise nature of the constitutional infringement alleged. Under this requirement,. the taxpayer must show that the challenged enactment exceeds specific constitutional limitations imposed upon the exercise of the congressional taxing and spending power and not simply that the enactment is generally beyond the powers delegated to Congress by Art. I, § 8.

Id. at 102-103.

Applying this test, the Court in *Flast* specifically held that federal taxpayers have standing to challenge the constitutionality of programs enacted pursuant to congressional power under the Taxing and Spending Clause of art. I, § 8 of the Constitution. The plaintiffs in *Flast* challenged expenditures by the Secretary of Health, Education and Welfare under Titles I and II of the Elementary and Secondary Education Act of 1965. That Act was an exercise by Congress of its power to spend for the general welfare under art. I. *Id.* at 103. It was alleged that certain expenditures under the Act were in violation of the Establishment Clause. The Court ruled that the

Establishment Clause acted as a constitutional limitation on the taxing and spending power of Congress under art. I. *Id.* at 104. Appellees in this case meet the requirements of taxpayer standing enunciated in *Flast*. The AFLA was also enacted pursuant to the Taxing and Spending Clause.

As the district court stated, the plaintiffs in *Valley Forge* were not challenging any expenditure whatsoever, they were challenging the disposal of surplus federal property, *Kendrick* v. *Bowen*, 657 F.Supp. at 1555. This Court in *Valley Forge* noted that the legislation authorizing the challenged action was passed pursuant to the Property Clause, art. IV, , cl. 2 and held that this fact was "decisive of any claim of taxpayer standing under the *Flast* precedent." 454 U.S. at 480 (footnote omitted). The challenge by appellees here is not at all similar to that in *Valley Forge*.

The Secretary interprets *Valley Forge* to hold that only facial challenges to congressional enactments can be brought under federal taxpayer standing. The Secretary's argument must fail for two reasons. First, the Secretary's interpretation reads too much into the Court's ruling in *Valley Forge* and ignores the facts in *Flast*. The fallacy of this interpretation can be seen by an examination of *Flast* and other cases upholding taxpayer standing and by an analysis of the reasoning in those cases where taxpayer standing has been denied. Secondly, the Secretary distorts the nature of the appellee's claim and strains to equate it with the claim in *Valley Forge*.

A. *Flast* and the Extent of Taxpayer Standing

In *Flast* the defendants were the federal officials in the Executive Department entrusted by Congress with the duty to administer the challenged Act. This Court summarized the complaint in *Flast* as follows:

> While disclaiming any intent to challenge as unconstitutional all programs under Title I of the Act, the complaint alleges that federal funds have been disbursed under the Act, "with the consent and approval of the [appellees]," and that such funds have been used and will continue to be used to finance "instruction in reading, arithmetic, and other subjects and for guidance in religious and sectarian schools" and "the purchase of textbooks and instructional and library materials for use in religious and sectarian schools." . . . The complaint asked for a declaration that appellees' actions in approving the expenditure of federal funds for the alleged purposes were not authorized by the Act or, in the alternative, that if appellees' actions were deemed within the authority and intent of the Act, "the Act is to that extent unconstitutional and void."

392 U.S. at 87.

This language makes it clear that the Court did not intend to prohibit challenges to the actions of executive officers in implementing congressional spending schemes such as that presented here. In *Wheeler* v. *Barrera*, 417 U.S. 402 (1974), this Court declined to rule on the issue of whether delivery of Title I services to parochial school students on the premises of parochial schools would violate the Establishment Clause. The Court noted that Title I did not require on-premises parochial school instruction and that "the First Amendment implications may vary according to the precise contours of the plan that is formulated." *Id.* at 426. This Court said:

> The task of deciding when the Establishment Clause is implicated in the context of parochial school aid has proved to be a delicate one for the Court. Usually it requires a careful evaluation of the facts of the particular case. It would be wholly inappropriate for us to attempt to render an opinion on the First Amendment issue when no specific plan is before us. A federal court does not sit to render a decision on hypothetical facts . . ..

Id. at 426-427 (citations omitted).

In *Aguilar* v. *Felton*, 473 U.S. 402 (1985), this Court ruled on the merits of a taxpayer challenge to New York City's plan for implementing Title I. This Court specifically stated that the case was a taxpayer suit. *Id.* at 407. The defendants were the Secretary of the United States Department of Education and the Chancellor of the New York City Board of Education. In holding that jurisdiction by appeal under 28 U.S.C. § 1252 did not lie, the Court noted that the decision appealed was not one in which the court of appeals had "held an Act of Congress unconstitutional as applied (i.e. that the section, by its own terms, infringed constitutional freedoms in the circumstances of that particular case) or as a whole." *Id.* at 408, n. 7. This holding that the Court's jurisdiction was properly by way of petition for certiorari and not by appeal is significant. It was based upon the interpretation of 28 U.S.C. § 1252 in *United States* v. *Christian Echoes National Ministry*, 404 U.S. 561 (1972).

In that case, the Court made a distinction between a holding that an act is unconstitutional as applied and a holding that a result obtained by the use of the statute is unconstitutional. *Id.* at 565. The latter type of holding is not appealable under § 1252, and it was this type of holding that the Court held it was reviewing in *Aguilar*. The significance of this is that the Court was acknowledging that the taxpayer challenge in *Aguilar* was limited to the manner in which the Department of Education was administering Title I in New York City and was not a challenge to Title I itself.

This directly corresponds with the Second Circuit's characterization of that case. *Felton* v. *Secretary, U.S.*

Department of Education, 739 F.2d 48 (2d Cir. 1984), *aff'd sub nom. Aguilar* v. *Felton*, 473 U.S. 402 (1985). The Second Circuit also acknowledged that the case was brought by taxpayers whose standing was based on the Court's holding in *Flast*. *Id.* at 52. The Second Circuit characterized the complaint as challenging the delivery of services on the premises of parochial schools and said further that the program of on-premises delivery was based on regulations issued by the Secretary "[g]oing somewhat beyond the statute." *Id.* at 50.

B. *Valley Forge* and the Limits of Taxpayer Standing

The Secretary's interpretation of *Valley Forge Christian College* v. *Americans United for Separation of Church and State*, 454 U.S. 464 (1982), barring the claims here because they challenge executive action and not congressional action, misreads *Valley Forge* and would make a nullity of *Flast*.

The plaintiffs in *Valley Forge* challenged the transfer of surplus federal property by the Secretary of Health, Education and Welfare to a sectarian institution. The transfer was an isolated action taken pursuant to the Federal Property and Administrative Services Act of 1949, 40 U.S.C. §471 *et seq*. This Act was passed under the authority of the Property Clause of the Constitution, art. IV, §3, cl. 2. Not only was this not a congressional spending program, the transfer did not involve the expenditure of any funds. The Court in *Flast* specifically limited taxpayer standing to suits involving congressional acts passed pursuant to the Taxing and Spending Clause, art. I, §8. 392 U.S. at 102. In *Valley Forge* the Court declined to expand taxpayer standing to suits involving congressional acts passed pursuant to other clauses.

Besides citing *Flast*, the *Valley Forge* Court discussed only two other cases in illustrating the limits of taxpayer standing: *Schlesinger* v. *Reservist Committee to Stop the War*, 418 U.S. 208 (1974), and *United States* v. *Richardson*, 418 U.S. 166 (1974). *Schlesinger* involved a claim that the holding of a commission in the armed forces reserve by members of Congress was a violation of the Incompatibility Clause, art. I, §6, cl. 2., which states, "No person holding any Office under the United States, shall be a member of either House during his Continuance in Office." *Richardson* involved a claim that legislation allowing the CIA to withhold from the public detailed information about its expenditures violated the Accounts Clause, art. I, §9, cl. 7, which states, "And a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time."

A reading of both of these cases, as well as the summary of their holdings contained in the *Valley Forge* opinion, reveals that taxpayer standing was denied because neither case involved a challenge to an enactment under the Taxing and Spending Clause of art. I, §8, the same factor that was fatal to the standing claim in *Valley Forge*. The only reference with respect to Executive Branch action and taxpayer status is the following statement in *Schlesinger:*

> We agree with that conclusion [of district court denying taxpayer standing] since respondents did not challenge an enactment under Article I, section 8, but rather the action of the Executive Branch in permitting Members of Congress to maintain their Reserve status.

418 U.S. at 228 (footnote omitted). This statement cannot be reasonably interpreted to bar taxpayer challenges to the manner in which an Executive Branch agency imple-

ments a spending program enacted pursuant to Congress' power to spend for the general welfare under art. I, § 8.

A proper understanding of the limitation of taxpayer standing to executive action is gained by a re-reading of the *Flast* decision, as the Court did in *Valley Forge* and the district court did in this case. In *Flast*, the Court, after limiting taxpayer cases to those challenging exercises of power under art. I, § 8 said, "It will not be sufficient to allege an incidental expenditure of tax funds in the administration of an essentially regulatory statute." 392 U.S. at 102.

C. The Secretary Ignores Settled Law and Attempts to Gut this Court's Decision in *Flast*.

A review of the jurisdictional statement and the various briefs of the parties filed in *Flast* v. *Cohen* is instructive and clearly demonstrates that the Secretary is attempting to now persuade this Court with the same arguments which the government made to this Court 20 years ago in *Flast*.

In the jurisdictional statement filed in *Flast*, the question presented was as follows:

> The appeal presents a single question: Do citizens and taxpayers of the United States have standing to challenge in the federal courts an expenditure of Federal funds on the ground that it is in violation of the establishment and free exercise provisions of the First Amendment to the United States Constitution?

The government, in its brief in *Flast*, well understood the nature of the question presented to the Court in that case, stating it in language similar to that stated by the taxpayers as follows:

> Whether appellants, as citizen-taxpayers, have standing, solely by virtue of that status, to enjoin federal officers from approving federal grants to State agencies which allegedly use the funds in violation of the First Amendment?

(*Flast* Brief for Appellees at 2).

The government, in its argument in *Flast*, stated:

> That it is the specifics of administration that they assail rather than the constitutionality of the Act—a distinction which, as discussed below, is decisive on the three-judge court question—becomes even more clear when other statements in their brief are examined in light of the structure of the Act. . .

(*Flast* Brief for Appellees) at 13-14).

This case cannot be said to be less of an attack on a federal taxing and spending enactment than *Flast*. It is apparent that even after 20 years the government is still making the same argument long ago rejected by this Court in *Flast*.

CONCLUSION

For all of the foregoing reasons, the judgment of the District Court for the District of Columbia should be affirmed.

Dated: February 13, 1988

Respectfully submitted,

Of Counsel:
ROBERT W. NIXON
6840 Eastern Avenue, NW
Washington, DC 20012
HAROLD J. LANCE
204 N. San Antonio Ave.
Ontario, CA 91762
ROLLAND TRUMAN
4522 Greenmeadow Road
Long Beach, CA 90808

LEE BOOTHBY
Counsel of Record
JULIE B. KAPLAN
BOOTHBY, ZIPRICK & YINGST
208 W. Mars Street
Berrien Springs, MI 49103
(616) 471-7787
Counsel for Council on Religious Freedom,
Amicus Curiae

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Nos. 87-253, 87-431, 87-462 and 87-775

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES,
Appellant,

v.

CHAN KENDRICK, et al.,
Appellees.

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES,
Appellant,

v.

CHAN KENDRICK, et al.,
Appellees.

CHAN KENDRICK, et al.,
Cross-Appellants,

v.

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES
Cross-Appellee.

UNITED FAMILIES OF AMERICA,
Appellant,

v.

CHAN KENDRICK, et al.,
Appellees.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF OF AMICI CURIAE

NOW Legal Defense and Education Fund,
National Abortion Rights Action League
(List of Amici continued on inside front cover)

IN SUPPORT OF APPELLEES AND CROSS-APPELLANTS

SARAH E. BURNS
Counsel of Record
SARA L. MANDELBAUM
MARSHA LEVICK
NOW Legal Defense and Education Fund
99 Hudson Street, 12th Floor
New York, N.Y. 10013
(212) 925-6635
and,
1333 H Street, NW, 11th Floor
Washington, D.C. 20005
(202) 682-0940

American Association of University Women,
American Humanist Association,
Americans for Religious Liberty,
Black Women's Agenda,
B'nai B'rith Women, Inc.,
Center for Law and Social Policy,
Committee to Defend Reproductive Rights,
Equal Rights Advocates,
National Emergency Civil Liberties Committee,
National Organization for Women,
National Women's Health Network,
National Women's Political Caucus,
Northwest Women's Law Center,
United States Student Association,
Voters for Choice,
Women's Law Project,
Women's Legal Defense Fund,
Zero Population Growth

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INTEREST OF AMICI CURIAE

The interest of the amici curiae are set forth in Appendix B attached to this brief.[1] Amici curiae are deeply concerned about the governmental promotion of religion and by the discrimination among religions built into the federal Adolescent Family Life Act. Amici are also concerned that the AFLA restricts and coerces women in their reproductive decisionmaking by silencing educational and health care professionals who would otherwise provide young women and their parents with full and accurate information about women's options with respect to contraception and abortion. This restriction and coercion affects poor

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[1] The interests of each amicus curiae are set forth in detail in Appendix B. In accordance with Rule 36.2 of the Rules of this Court, amici file this brief with the consent of all parties. Letters of consent, facsimiles of which appear in Appendix A, are being filed with the Clerk of the Court.

women particularly harshly.

STATEMENT OF THE CASE

Amici curiae adopt the Statement of the Case as set forth by the appellees and cross-appellants Kendrick, et al., in whose support amici file.

SUMMARY OF ARGUMENT

The issue before the Court is whether the Adolescent Family Life Act ("AFLA"), designed to involve religious groups, community groups, and families in teaching and counseling programs to curb sexual activity and pregnancy among adolescents, can pursue these goals by forbidding funded groups to provide, directly or indirectly, abortion counseling or referral without establishing religion. Amici curiae support and adopt the arguments set forth by appellees and cross-appellants Kendrick et al., urging affirmance of the district court's finding that the AFLA is unconstitutional on

establishment clause grounds, and seek to highlight that the AFLA grantees' provision of "prevention" and "care" services has involved and continues to involve[2] religiously-guided teaching and inculcation of religious doctrine.

Amici curiae also urge affirmance on alternative grounds, see Bankers Ass'n v. Shultz, 416 U.S. 21 (1974), free speech and due process, because the AFLA is designed to steer adolescent participants as they exercise their fundamental rights in reproductive decisionmaking by silencing "prevention" and "care" service providers and censoring the information with which adolescent participants make decisions. Accordingly, amici urge this

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[2] Amici curiae have lodged with this Court ten (10) copies of published documents obtained from current AFLA grantees together with affidavits authenticating the sources of the documents. Those documents are referred to herein as L.D. ("Lodged Documents") followed by the appropriate page number as they appear in the lodged document.

Court to strike down the statute as a whole, not just sever the portions of the AFLA involving religious groups.

ARGUMENT

The central issue before the Court is whether government funding of religious organizations to disseminate information inspired by religious doctrine is unconstitutional.[3] The information delivered through the program concerns a topic that all parties to and participants in this case agree is of great public importance -- the sexual activity and reproductive decisionmaking of adoles-

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[3] Ancillary to, but part of, that issue is the impossibility of severing the language which unconstitutionally affiliates government with religious organizations from the remainder of the statute, since the entire statute was conceived and executed expressly to teach morals and values. See Brief of Appellees and Cross-Appellants Kendrick et al. For a full discussion of the establishment clause case law and issues implicated in this case, amici curiae refer this Court to the Brief of Appellees and Cross-Appellants Kendrick et al.

cents. The information provided through the Adolescent Family Life Act, 42 U.S.C. Sec. 300z et seq., is intended to and very likely does form an important basis for the major reproductive and life decisions of its teenage program participants. The statute, however, expressly precludes the funding of any speech in the nature of abortion counseling, or referral,[4] and requires funded speech, among other things, to discourage use of contraception and to encourage adoption over other responses to teen pregnancy. The result is a silencing of abortion-related speech by any AFLA service provider, even with respect to activities not funded by the AFLA, and the provision of distorted, inaccurate and un-

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[4] Specifically, the statute restricts funding as follows: "[g]rants or payments may be made only to programs or projects which do not provide abortions or abortion counseling or referral, or which do not subcontract with or make any payment to any person who provides abortion or abortion counseling or referral." 42 U.S.C. Sec. 300z-10a.

balanced "information" to young women and their parents. This statutorily mandated omission of information amounts to misinformation, and distorts the ability of young women to make critical reproductive life decisions in consultation with their physicians and parents. Thus, the statute impinges upon the constitutional rights of free speech, thought and privacy of the program's potential service providers and adolescent participants.

I. THAT CURRENT GRANTEES, LIKE GRANTEES EXAMINED AT TRIAL, ARE PROMOTING RELIGION DEMONSTRATES THE CONSTITUTIONAL DEFECT INHERENT IN THE STATUTE.

In certain kinds of government programs, it is possible for religiously-affiliated groups to provide purely secular services without the unconstitutional promotion of religious doctrine; in such circumstances religious organizations should stand on an equal footing with secular service providers

having no religious connections. The AFLA is not such an endeavor. The AFLA, by its very terms, requires the government to place its seal upon particular religious doctrines.

The record starkly demonstrates that the speech of religious organizations involved in the initial AFLA demonstration program is inspired by religious doctrine. By requiring involvement of religious organizations but precluding abortion counseling or referral by grantee service providers, directly or indirectly, the AFLA selects those religions which forbid even the contemplation of abortion.[5] For such religions, abortion is

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[5] While the religions funded under the AFLA teach that full personhood exists from the moment of conception and develop their teachings on that doctrine, this Court has appropriately held that government may not advocate one theory of when life begins. Roe v. Wade, 410 U.S. 113, 159-62 (1973). Nor may the state constitutionally assert an interest that grants the fetus a status equivalent to that of the woman. By selectively funding organizations which adhere to the conviction that developing embryos should have the same legal protections as born persons, the federal

never discussed in any positive or even neutral terms in either the devotional or the service context. It is no accident then that, as the record shows, AFLA funding has flowed to select religious groups -- Catholic, Mormon, Fundamentalist -- but not others. The result is governmentally funded, doctrinally approved coercion of young women.

For example, the employees of Catholic grantees are bound by Church doctrine that periodic sexual abstinence in marriage is virtuous, and that extramarital sex, contraceptives and abortion are evil.[6] The Catholic ideal is that a woman has a duty to sacrifice her interests for those of an embryo or fetus.[7] Similarly, "[f]or the fundamentalist, God is the cause and power of all that is and God governs all natural processes. Therefore, not only is the conceptus regarded as of equal value and personhood with the woman, but conception is viewed as the consequence of an Act of God." J.A. 594 (Simmons Affirmation). A woman then is not seen as a participant in her fate, but rather as the passive vehicle through which the

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government has done indirectly that which it is prohibited from doing directly: it has placed its "power, prestige and financial support," see Engel v. Vitale, 370 U.S. 421, 431 (1962), behind a particular theory of human existence. The government's direct support of this religious belief is not merely incidental to its adoption of a secular policy; rather, the federal government has chosen to fund certain religious groups specifically because of their anti-abortion beliefs, and not merely in spite of them. See Sec. 300z(10)(a).

[6] Pope Paul VI, Humanae Vitae 225-27, 229, 231 (July 25, 1968)(encyclical on the regulation of birth), as published in The Papal Encyclicals 1958-1981 (C. Carlen Ihm ed. 1981); Ethical and Religious Directives for Catholic Health Facilities, J.A. 550. (Appendix A to Maisenbacher Affirmation).

[7] One study guide for a film used in an AFLA Catholic Family Services program stated: "The unwed mother is a person in need and calls us to be compassionate, as Christ was. She is also a sign of hope, witnessing to the fact that the life of her child is worth personal sacrifice." J.A. 559.

divine will is manifested. The issue is not, of course, the validity of these religious views, which this Court is not permitted to determine.[8] The point is, however, that the government may not constitutionally enforce these views on women.

Although many of the AFLA-sponsored seminars and counseling sessions explicitly refer to "God," religious doctrines and

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[8] Amici curiae certainly do not argue that, when unaided by government funding, such groups may not advocate their religious views. These and all other religious organizations are entitled not only to hold freely their beliefs, but to have those beliefs respected by all instruments of government. Indeed, historically, the first amendment protected from government intrusion and coercion those very religious groups now being funded. The establishment clause "embodie[s] the Framers' conclusion that government and religion have discrete interests which are mutually best served when each avoids too close a proximity to the other." Abington School District v. Schempp, 374 U.S 203, 259 (1963). See also Everson v. Board of Educ., 330 U.S 1, 15-16 (1947).

religious affiliations,[9] they need not mention religious words like "God" or "sin" to convey

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[9] See, e.g., L.D. 67 (Current AFLA grantee, Pregnancy Helpline, provides clients with a brochure called "The Life Rosary," which states: "Mary and Joseph were distressed to have lost Jesus in the temple. Many who come to us are distressed because they have lost or never found Christ. May each young woman who comes to us find Him through our counseling, help, and prayers."); L.D. 14 (Current AFLA grantee Christian Family Care Agency calls on young pregnant AFLA program participants to "[p]ray with us for: God's will for your family with regard to the child He has for you; Wisdom for our staff as we serve the children and families God sends us."); L.D. 57 (Current AFLA grantee, The Pregnancy Distress Center, instructs its counselors to "share God's plan for sex in marriage . . ." with its clients); L. D. 72 (Current AFLA grantee, A Woman's Choice, recommending that "[w]hen a person who is tempting comes around, start talking about Jesus Christ"); J.A. 36-37 (St. Ann's Infant and Maternity Home's manual instructing parents that "Sexuality is one of God's greatest gifts" and urging them "to find peace and strength in a full sacramental life with the Christ who loves them"); J.A. 551 (St. Margaret's employee handbook stating that it is a "Christian institution," providing medical care "in harmony with the teaching of the Catholic Church," and that each person is "a child of God [from] the very moment of conception").

religious ideology.[10] For example, current AFLA grantee, the Pregnancy Distress Center of Columbus, Ohio, features a "Psychological Profile of Women Seeking An Abortion." For the "neurotic," the Center encourages counselors to "stress fetal development and prayer assignment." For the woman with a "character disorder," the Center claims that "these disorders are a result of repeated broken relationships ... Use any argument you can--don't worry about causing guilt feelings--you won't." L.D. 56. (emphasis added). Perhaps the worst establishment clause violation occurs when the young person and his

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[10] See, e.g., J.A. 572 (the objectives of AFLA-funded "Here's Life Washington" program are "[t]o promote a lifestyle based on Biblical principles" through "[i]ndividual counseling based on Scriptural principles"); J.A. 284 (Deposition of John D. Hartum) (stating that he "based [the AFLA-funded program] all on Jesus Christ" because "That's the way I do things ..."); J.A. 390 (Christian Sexuality Program "whose goal is to develop and disseminate an educational program based on the teachings of the Catholic Church").

or her parents hear government-funded "teaching" or "medical advice" that includes these the same religious messages but fails to acknowledge that the teaching emanated from and may be distorted by the views of a religious source. See pp. 30-31 infra (recounting information provided by St. Margaret's and Families of the Americas Foundation).

The examples of religious indoctrination shown in the record are not just a few "abuses" in the early stages of the program's implementation as the appellant would have this Court believe. See Brief of Appellant Bowen, at 36 n.30 & 41. This is made clear by the conduct of current AFLA grantees.[11] For example, on a recent visit to

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[11] See generally the lodged documents referred to in note 2 supra. The appellant argues that religiously affiliated grantees do not promote religion by complying with the AFLA's abortion restrictions because "the statute itself imposes the same restriction on the funded programs." Brief of Appellant

the Pregnancy Distress Center of Columbus, Ohio, one woman was told by the counselor to open her heart to God referred to a local church for more counseling. L.D. 28. In fact, the Pregnancy Distress Center of Columbus, Ohio, which recently received $119,135 in AFLA funds,[12] states in its counseling manual: "When counseling girls and women considering an abortion, sometimes we have the opportunity to share our faith with them and urge them to let God be a part of

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Bowen, at 33. First, this argument falsely assumes that the "secular" nature of the funded activity is severable from the religious convictions of those providing the services, and thus assumes that the abortion restriction is not on its face tantamount to promotion of certain religious tenets. Secondly, it ignores the fact that through the AFLA, religious organizations have been and continue to be granted an open license to provide services and counseling in furtherance of their religious missions. The documents lodged with this Court herewith illustrate this point.

[12] L.D. 109-10 (list of current grantees and amounts awarded, as announced by the U.S. Department of Health and Human Services on November 5, 1987).

this important decision." See L.D. 55. The manual continues by suggesting that counselors suggest to clients: "If Jesus were sitting right here, would He tell you that it's alright to have an abortion?" Id. Clearly, the AFLA's problem of religious establishment has not been cured.

That not all AFLA grantees are religious organizations does not save the program; the statute was intended to and does encourage all grantees to talk about moral values. This has resulted in a particularly pernicious version of government involvement in religion in the case of at least one current AFLA grantee. As one affiant described a visit to receive pregnancy counseling at "A Woman's Choice" in Vienna, Virginia, the counselor ascertained the counselee's religion (Jewish) and proceeded to read her an article by a rabbi. While the article did not say that the Jewish faith disapproved of abortion, the counselor

implied that it did and used other religious references and terminology to pressure the counselee not to terminate the pregnancy. L.D. 69. There was no indication that "A Woman's Choice" had any affiliation with the Jewish faith. The strategy of this AFLA grantee was fully consistent with the AFLA's design and purpose. The misrepresentation of religious tenets and exploitation of the counselee's faith to serve the AFLA's end demonstrates dramatically the damage that the AFLA has done and will do if it is permitted to stand.

II. THE AFLA TRAMMELS THE FREE SPEECH AND PRIVACY RIGHTS OF THOSE HAVING CONTACT WITH THE PROGRAMS.

The AFLA was designed to alter the terms of the public discourse on the issues of adolescent sexual activity, reproductive health, contraception and abortion. It is intended to bring about a change in the

behavior of young people by silencing the educators, counselors, community leaders, and medical professionals who are willing openly and accurately to discuss adolescent sexuality and reproductive health, including contraception and abortion, and by amplifying with government funding the voices of those who promise not to discuss these critical issues.

A. By Its Very Terms, Section 300z-10 Requires Viewpoint-based Discrimination in Violation of the First Amendment.

1. That the censorship of speech at issue here occurs as a condition on government funding does not alter its invidious nature.

The AFLA requires the withholding of information critical to reproductive choice and encourages the spreading of misinformation in the guise of providing education and health care. By its very terms, then, Section 300z-10 requires viewpoint-based discrimination in

violation of the first amendment:[13] it prohibits AFLA-funded facilities, their professional personnel, and their subcontractors from engaging in activity which advocates, encourages or promotes abortion.[14] Although

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[13] U.S. Const. amend. I.

[14] The AFLA does not prohibit speech which discusses abortion in a pejorative light. Indeed it was understood by one key AFLA administrator that talking about abortion as "killing" was "probably all right." J.A. 93 (Deposition of Sheeran, Director, Division of Program Development and Monitoring, HHS Office of Adolescent Pregnancy Programs)(referencing the AFLA's requirements and how to monitor them). In addition to being viewpoint-based, Section 300z-10's requirement that AFLA grantees avoid all conduct which may "in any way have the effect of facilitating obtaining an abortion" is unconstitutionally vague. When a statute is so vague as to "operate[] to inhibit the exercise of individual freedoms affirmatively protected by the Constitution," it is invalid. Cramp v. Board of Public Instruction, 368 U.S. 278, 288 (1961). Section 300z-10, like the ordinance struck down in Coates v. Cincinnati, 402 U.S. 611 (1971), is unconstitutionally vague because it ". . . subjects the exercise of . . . [a] . . . right to an unascertainable standard, and unconstitutionally broad because it [penalizes] . . . constitutionally protected conduct." Id. at 614.

There is no limit to the type of activity which could fall within the scope of Section

there is no constitutional requirement that Congress create or subsidize programs such as the AFLA program, "the manner in which [HHS] dispenses benefits [pursuant to such programs] is subject to constitutional limitation." Maher v. Roe, 432 U.S. 464, 469-70 (1977). Having undertaken to create a program designed to discourage adolescent sexual activity through sex education and counseling, neither Congress nor HHS can "discriminate invidiously in their subsidies in such a way as to 'ai[m] at the suppression of [what are seen as] dangerous ideas.'" Regan v. Taxation With Representation, 461 U.S. 540, 548 (1983).[15]

300z-10. The presence in a clinic waiting room of a newspaper containing an abortion clinic advertisement or a Yellow Pages containing such advertisements might be deemed to violate this regulation.

[15] See also Cornelius v. NAACP Legal Defense & Educ. Fund Inc., 473 U.S. 778, 811-12 (1985) (exclusion from government benefit that is in fact based on the desire to suppress a particular point of view with which government disagrees is unconstitutional); Big Mama Rag Inc. v. United States, 631 F.2d 1030,

The AFLA does just this in a very cunning way by conditioning government funding on a pledge of silence on the subject of abortion as a medical and personal option.[16] A recipient of AFLA funds is precluded from abortion counseling or referral even where such speech is subsidized by non-AFLA funds. The statute requires further that grantees not subcontract with any organizations that refuse to accede to the AFLA's speech restrictions.[17]

1034 (D.C. Cir. 1980) ("although first amendment activities need not be subsidized by the state, the discriminatory denial of [discretionary benefits] can impermissibly infringe free speech"). The case of Harris v. McRae, 448 U.S. 297 (1980), is not to the contrary. Unlike the right to obtain an abortion at government expense, freedom of expression untrammeled by government censorship in any of its forms has been accorded the highest level of constitutional protection. Carey v. Brown, 447 U.S 445 (1980).

[16] This pledge has of course been an assymetrical one, however, as the DHHS has not interpreted the statute as forbidding speech which condemns abortion. See note 14 supra.

[17] "Grants . . . may be made only to programs . . . which do not provide . . . abortion counseling or referral, or which do

In addition, the requirement that grantees "coordinate, integrate, and provide linkages among providers of care, prevention, and other services for eligible persons," Sec. 300z-3(a)(2),[18] imposes speech restrictions on community service providers who, and information resources that, are drawn into cooperation with the AFLA project. The government's AFLA grants then, do not merely add certain approved messages to an already busy marketplace of ideas; they co-opt and then appropriate the entire marketplace.

In the low-income communities with high

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not subcontract with or make any payment to any person who provides . . . abortion counseling or referral." Sec. 300z-10(a)(emphasis added).

[18] ". . . the purposes of this subchapter are . . . to establish innovative, comprehensive, and integrated approaches to the delivery of care services for pregnant adolescents . . . which shall be based upon an assessment of existing programs and, where appropriate, upon efforts to establish better coordination, integration, and linkages among such existing programs . . . " 42 U.S.C. Sec. 300z(b)(3)(emphasis added).

adolescent pregnancy rates that are the explicit targets of the government's "chastity-reinforcement" campaign,[19] the AFLA's restrictions on disfavored information have a particularly insidious effect. The young people and their parents who will be AFLA program participants in these disadvantaged areas have meager educational and health care resources at their disposal[20] and their needs

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[19] "In approving applications for grants . . . the Secretary shall give priority to applicants who -- (1) serve an area where there is a high incidence of adolescent pregnancy; (2) serve an area with a high proportion of low-income families and where the availability of programs of care . . . is low; (3) show . . . the ability to bring together a wide range of needed . . . services[,] . . . a well-integrated network of such services . . . [or] will utilize to the maximum extent feasible existing available programs and facilities such as neighborhood and primary health care centers, . . . agencies serving families, youth, and children . . . [and] maternal and infant health centers . . ." 42 U.S.C. Sec. 300z-4(a)(1)-(4).

[20] As nurse Kim Maisenbacher of St. Margaret's hospital explained, "I believed that my teenage patients could get abortion or contraception information from outside

leave them that much more vulnerable to government-sponsored efforts to steer their behavior. The greater the impoverishment of the community, the more powerful the inducement to relinquish first amendment integrity.[21] By co-opting community networks and

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community resources. Subsequently, I found out this was practically impossible. Many of the teenage TAPP patients are poor, and nearly all are ignorant on how to make use of community resources." J.A. 551 (Maisenbacher Affirmation).

[21] Although such intent does not appear explicitly on the face of the statute, the Committee Report documents the unqualified intentions of the AFLA's proponents that a mechanism should be created through which the speech restrictions can be imposed upon <u>all</u> public benefit programs which the federal government funds, subsidizes, or cooperates with:

> The DHHS has been given the authority under the act to review all programs which provide prevention . . . for pregnant adolescents . . . <u>[T]he Secretary should examine other programs to determine the degree of duplication and philosophical consistency</u> existing in current Federal programs including family planning, welfare and health maintenance programs. To the greatest extent possible there

local service providers, the federally funded AFLA programs -- instead of fostering family and community structures -- may bring about even further erosion of those very institutions.

The government may not, as Congress has done with the AFLA, deny government funding on the ground that a grant applicant has engaged in constitutionally protected activity with sources of funds independent of the government program at issue. In Planned Parenthood v. Arizona, 718 F.2d 938 (9th Cir. 1983), aff'd in part rev'd in part after remand, 789 F.2d 1348 (9th Cir.), aff'd mem. sub nom. Babbitt v. Planned Parenthood, 107 S. Ct. 391 (1986), for example, this Court summarily affirmed a holding that Arizona may not deny grants to

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> should be consistency in the approaches utilized in new and existing programs that deal with the problems of adolescent sexual activity and pregnancy.

S. Rep. No. 161, 97th Cong., 1st Sess. 16 (1981)(emphasis added).

Planned Parenthood so as to "unreasonably interfere with the right of Planned Parenthood to engage in abortion or abortion-related speech activities" funded by independent sources. Id. at 944.

Similarly, in Federal Communications Comm'n v. League of Women Voters, 468 U.S. 364 (1985), the Court invalidated a government ban on editorializing by radio stations receiving federal grants, in part because the ban would have prohibited a station "from using even wholly private funds to finance editorial activity." Id. at 400. "Where . . . a speaker desires to convey truthful information relevant to important social issues such as family planning and the prevention of venereal disease . . . the first amendment interest served by such speech [is] paramount." Bolger v. Youngs Drug Products Corp., 436 U.S. 60, 69 (1983). The government may not use its pregnancy prevention program to silence grant

applicants who, while working to further the purpose of the Act, also wish to disseminate information about contraception and abortion, particularly when this activity is supported by non-AFLA funds.

2. The AFLA scheme results in government-funded misinformation that is designed to misguide and intimidate adolescents.

The AFLA requires that grantees, systematically and without notice to program participants, withhold information about contraceptives and abortion.[22] The record is clear

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[22] Former Senator Jeremiah Denton, originator and key proponent of the AFLA, faulted prior federal family planning programs on the theory that exposure to accurate medical information regarding abortion and birth control causes increased sexual activity among young men and women. Senator Denton and the bill's co-sponsors presented the AFLA as an alternative to programs funded under Title X of the Public Health Service Act of 1984. They explained that the AFLA demonstration projects were explicitly designed to curb teen access to such information, while simultaneously enlisting religious groups in a state-sponsored effort to urge upon young adults those "moral values" of which Senator Denton and the other sponsors approved. See

that the AFLA has effectively silenced speech essential to reproductive decisionmaking. It has preempted the provision of accurate medical information to health care recipients by physicians, nurses, social workers and educators, rendering them mere agents of state-funded and religious ideology -- ideology which is, moreover, frequently at odds with sound medical practice. Dr. Louis Laz, an obstetrician-gynecologist at AFLA grantee St. Margaret's, described the frequent conflicts he faced between standard ethical

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S. Rep. No. 161, 97th Cong., 1st Sess. (July 21, 1981). See also Examination of the Role of the Federal Government in Birth Control, Abortion Referral, and Sex Education Programs: Hearings Before the Senate Comm. on Labor and Human Resources, 97th Cong., 1st Sess. 3 (Mar. 31, 1981); An Overview of the Adolescent Pregnancy Problem: Hearings Before the Subcomm. on Family and Human Services of the Senate Comm. on Labor and Human Resources, 98th Cong., 2nd Sess. 171 (Apr. 24 and 26, 1984); Consideration of the Reauthorization of Title X of the Public Health Service Act: Hearings Before the Subcomm. on Family and Human Services of the Senate Comm. on Labor and Human Resources, 98th Cong., 2nd Sess. 270, 292 (Apr. 5 and May 1, 1984).

medical practice and the directives of the Catholic hospital:

> The religious directives forbid doctors at St. Margaret's from performing, prescribing, recommending or even referring for sterilization, abortion, or contraception even though these options are critical for the vast majority of obstetrical or gynecological patients . . . . The fetus or embryo is treated as a separate human patient whose treatment often imperils women's health and lives . . . Teenagers are not informed that an abortion is many times safer for them, in terms of risks to their lives, than continued pregnancy and childbirth. Women who have added childbirth risks imposed by cancer, heart problems, extreme obesity, lupus, diabetes, sickle cell disease, mental conditions, hypertension, to name a few, are never informed about abortion which might be medically indicated.

J.A. 527-28 (Laz Affirmation)(emphasis added).[23] Dr. Laz further enumerated several

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[23] The absolute ban on abortion counseling is contrary to the most basic standards of medical ethics which require that doctors discuss with their patients all available medical options and provide all information pertinent to the patient's exercise of informed consent. The total censorship of information about abortion, combined with

examples of distorted information provided by the hospital:

> The curriculum also lists complications and side-effects of the diaphragm, including toxic shock, which has never been proven. There is no association between spermicides, which are used in conjunction with the diaphragm, and the future development of congenital abnormalities . . . . The curriculum is very misleading in that it does not discuss any of the benefits of contraceptives except the benefits of natural family planning, for which no side effects are shown, even though natural family planning is a method that must be used in conjunction with a regular partner, and has never been used successfully with teenagers.

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subsequent pressure to surrender the infant, will coerce choice and subject women to increased medical and psychological risk. See Brief Amici Curiae of the American Public Health Assoc., et al., in Support of Appellees, Point I. See Colautti v. Franklin, 439 U.S. 379 (1979)(standard of care provision requiring physician to employ abortion technique which would most likely result in live fetus struck down as unconstitutionally vague and unduly restrictive of physician's exercise of discretion); Doe v. Bolton, 410 U.S. 179, 192 (1973)(Physician's discretion should be "exercised in the light of all factors -- physical, emotional, psychological, familial, and the woman's age -- relevant to the well-being of the patient.")

Id. at 534-35. Materials used by the Families of the Americas Foundation in its AFLA-funded "Adolescent Sexuality Program" define abortion as "[t]he premeditated killing of an unborn baby in the mother's womb during the period of gestation by artificially inducing the expulsion of the baby so that it does not survive." J.A. 587. In an obvious attempt to intimidate young women, the Foundation furnishes them with a highly misleading list of possible "immediate complications" of early abortions, including

> laceration of cervix, hemorrhage, perforated uterus, laceration of urinary bladder and ureters, air embolism, laceration of bowel, shock, transfusion reactions, laparotomy, hysterectomy, retained tissue, death, cardiac arrest, bronchial obstruction, and anaphylactic shock.

Id. at 587-88. The materials continue with a lengthy list of "Immediate Complications" for late abortions, both saline and hysterotomy, as well as "Delayed Complications" and

"Effects on Later Pregnancy." Id. at 588-89. The materials do not acknowledge that the likelihood of any such complications is minuscule;[24] nor do they list the risks attendant upon childbirth or the greater likelihood that childbearing may cause women, especially adolescent women, permanent health damage.[25] The harm of this misinformation is obvious when assessed in light of the limited access to information in this area, see text and notes pp. 26-30 supra, pp. 39-40 infra, especially for adolescents, see text and notes p. 44 infra.

As one court addressing this very issue

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[24] See Roe v. Wade, 410 U.S. 113, 149 (1973)(the Court took judicial notice of the relative safety of first trimester abortions compared with the statistical health risks of continued pregnancy and childbirth). See also Lebold, Grimes and Cates, Mortality From Abortion and Childbirth: Are the Populations Comparable? 248 J.A.M.A. 188, 191 (1982).

[25] See generally Brief Amici Curiae of American Public Health Assoc. et al., at Point I. B. for a discussion of the medical assessment of risks.

stated, the Constitution "does not permit the state to attempt to persuade women to decide not to terminate their pregnancies by keeping them in ignorance." Planned Parenthood v. Kempiners, 531 F. Supp. 320, 332 (N.D. Ill. 1981), vacated and remanded on other grounds, 700 F.2d 1115 (7th Cir.), aff'd on remand, 568 F. Supp. 1490 (1983). Where, as here, the regulated speech concerns a controversial but protected activity the government's authority to interfere through state-approved ignorance or misinformation is particularly limited. See Carey v. Population Serv. Int'l, 431 U.S. 678, 700 (1977).[26]

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[26] This Court has held that ". . . above all else, the first amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." Police Dep't of Chicago v. Mosley, 408 U.S. 92, 95 (1972), quoted in Arkansas Writers' Project v. Ragland, 107 S.Ct. 722, 727 (1987). The government cannot, therefore, discriminate between viewpoints or ideas, nor can it prohibit discussion of an entire topic. Edison Co. v. Pub. Serv. Comm'n of New York, 447 U.S. 530, 537 (1980). See Arkansas

The importance of the right to receive ideas[27] was emphasized in the Supreme Court's decision invalidating the removal of certain library books by public school officials. Board of Education, Island Trees Union Free School District v. Pico, 473 U.S. 853 (1982). The Court noted that the right to receive information is a necessary corollary to the writer's right to speak. Id. Here, a govern-

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Writers' Project, 107 S.Ct. at 727; Federal Communications Comm'n v. League of Women Voters, 468 U.S. 364, 384 (1985); Metromedia Inc. v. San Diego, 453 U.S. 490, 518-19 (1981) (plurality opinion). "[T]he state may not, consistently with the spirit of the First Amendment, contract the spectrum of available [medical] knowledge." Griswold v. Connecticut, 381 U.S. 479, 482-83 (1965).

Regardless of its motive, the government may not choose to further even a legitimate governmental interest "by keeping the public in ignorance of . . . entirely lawful," medical options, such as contraception and abortion. Virginia Pharmacy Board v. Virginia Consumer Council, 425 U.S. 748, 770 (1976).

[27] The right to receive information and ideas uncensored by the government has long been acknowledged by this Court. See Kleindienst v. Mandel, 408 U.S. 753 (1972); Stanley v. Georgia, 394 U.S. 557 (1969); Martin v. Struthers, 319 U.S. 141 (1943).

ment gag-order[28] prevents young women and their parents from speaking candidly with educators, counselors, and health practitioners, in order to pursue intelligently a course of action with regard to the young woman's sexual activity, reproductive health, and life decisions.[29] This is most harmful to the young adults whose decision when and whether or not to bear a child is one of the most

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[28] See also Valley Family Planning v. North Dakota, 489 F. Supp. 238, 242 (D.N.D. 1980), aff'd on other grounds, 661 F.2d 99 (8th Cir. 1981). (Citing Carey v. Population Serv. Int'l, 431 U.S. at 700 (state may not completely suppress dissemination of . . . truthful information about entirely lawful activity," quoting Virginia Pharmacy Board, 425 U.S. 748 at 773).

[29] This thwarts the efforts of those attempting to form beliefs about issues which are often debated in the public arena. Cf. Time, Inc. v. Hill, 385 U.S. 374, 388 (1967)(noting protected status of information needed or appropriate for coping with the exigencies of the period); Thornhill v. Alabama, 310 U.S. 88, 102 (1940).

important decisions they may make.[30]

B. The AFLA Unconstitutionally Burdens Young Women's Right of Choice in Matters of Contraception and Reproduction.

The government-funded AFLA program interferes with the fundamental right identified in Roe v. Wade, 410 U.S. 113 (1973), of a woman to choose whether or not to terminate her pregnancy, as well as the correlative right of access to information about contraceptives recognized in Carey v. Population Serv. Int'l, 431 U.S. 678 (1977). U.S. Const. amend. V. This interference is further reinforced by the government's decision to enlist, in pursuit of its purpose, the aid of

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[30] See Thornburgh v. ACOG, 106 S. Ct. 2169, 2185 (1986) ("Few decisions are more personal and intimate, more properly private, or more basic to individual dignity and autonomy") Bolger v. Youngs Drugs Products Corp., 463 U.S. 60, 74 n.30 (1983). ("The right to privacy in matters affecting procreation also applies to minors . . . . [and] it cannot go without notice that adolescent children apparently have a pressing need for information about contraception.")

religious organizations that oppose abortion. 42 U.S.C. Sec. 300z-10(a).

1. The AFLA Unconstitutionally Interferes With Informed Consent of Program Participants.

Insofar as the AFLA prescribes a unitary and authoritarian "solution" for all pregnant young women -- that of carrying an embryo to term -- and proscribes the free flow of information about alternative options from medical personnel, it impermissibly usurps the counseling role of the physician, and places a profoundly "chilling effect on the exercise of a constitutional right." Colautti v. Franklin, 439 U.S. 379, 394 (1979). See also City of Akron v. Akron Center for Reproductive Health, 462 U.S. 416, 472 n.16 (1983)(O'Connor, J., dissenting)(noting that certain "informed consent" provisions which effectively require a physician to parrot state ideology may constitute a first amend-

ment violation.)[31]

In Akron, this Court disparaged the statutory prescription of "a litany of information that the physician must recite to each woman regardless of whether in his judgment the information is relevant to her personal decision." Id. at 445. The Court continued, "It is not disputed that individual counseling should be available for those persons who desire or need it . . . ." Id. at 448 n.38. (emphasis added). See also Colautti v. Franklin, 439 U.S. 379 (1979).

The Court in Akron invalidated an "informed consent" provision requiring the physician to inform the woman, inter alia, that "the unborn child is a human life from the moment of conception" and that "abortion is a major surgical procedure." Akron, 462

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[31] The AFLA's restrictions on abortion speech translate into conditions of employment for AFLA grantee medical personnel. See e.g., J.A. 526, 550.

U.S. at 445. The provision included a list of possible health complications -- a "parade of horribles" -- which the Court characterized as "intended to suggest [the dubious idea] that abortion is a particularly dangerous procedure." Id. This Court invalidated it, noting that the requirements had been "designed not to inform the woman's consent but rather to persuade her to withhold it altogether." Akron, 462 U.S. at 444 (emphasis added). Using similar reasoning, in Planned Parenthood v. Danforth, 428, U.S. 52 (1976), the Court upheld an informed consent provision that it found to encourage accurate and complete counseling, because "the decision to abort . . . is an important, and often stressful one, and it is desirable and imperative that it be made with full knowledge of its nature and consequences." Danforth, 428 U.S. at 67 (emphasis added). See also Thornburgh v. ACOG, 106 S. Ct. at 2178.

The invalid Akron provisions are strikingly similar to the instruction prescribed in the AFLA programs -- the very kind of "litany" designed not to inform, but to mislead. Accordingly, the AFLA scheme, which is designed to withhold full knowledge about abortion from program participants, cannot be upheld.

2. The AFLA's Funding Scheme Impermissibly Coerces the Minor's Reproductive Life Decisionmaking.

This Court has previously noted that minors (as well as parents, who are often a primary source of guidance to their children), have an especially acute need for truthful information about sexuality and pregnancy.[32]

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[32] As the Court recognized in Bolger v. Youngs Drug Products Corp., 463 U.S. at 75 n.30, "adolescent children apparently have a pressing need for information about contraception." Thus, the statute at issue in Bolger prohibiting advertising about contraception was struck down because it inhibited the free flow of truthful information and denied adolescents and their parents the ability to discuss birth control and make informed decisions about sex. Id. at 74. Cf.

"[T]he potentially severe detriment facing a pregnant woman . . . is not mitigated by her minority. Indeed, considering her probable education, employment skills, financial resources, and emotional maturity, unwanted motherhood may be exceptionally burdensome for a minor." Bellotti v. Baird (Bellotti II), 443 U.S. 643 (1979).

The Act's restrictive funding scheme is designed to ensure that at least one of several possible obstacles will ultimately prevent a pregnant adolescent from considering or obtaining an abortion. In the case of those AFLA programs which prohibit any mention of abortion as an alternative to bearing a child, the adolescent will be kept ignorant of that option.[33] In the case of those programs

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Carey, 431 U.S. at 678 (provision prohibiting parents from distributing birth control to children is invalid).

[33] See, e.g., J.A. 484 (Lyon County Health Department's teaching manual states: "Discussion [of abortion] not included because

which do include a discussion of abortion, the presentations are biased so as to steer the teenager into the predetermined course of behavior of carrying to term.[34] Even a

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it is not an option to consider")(emphasis in original); J.A. 553 (Maisenbacher Affirmation)(Pregnant teens are "very ignorant" when they arrive at St. Margaret's Hospital and are "encouraged to become dependent on an institution which will deliberately perpetuate their ignorance by giving only medical procedures and information consistent with Catholic directives"). See also pp. text and notes p. 26 supra.

[34] The program descriptions are filled with seemingly benign language about supplying minors not merely with facts, but with values; when one realizes, however, that "the very purpose of religion is to transmit certain values," J.A. 597 (Simmons Affirmation), it becomes evident that the religious mission of funded groups and the raison d'etre of the AFLA are one and the same. Because of the impermissible fusion of the secular and the religious effected by the Act, good "values" and "accurate" decisions are, under this scheme, synonymous with being a "better Christian" and with living life "as God intended." J.A. 636-37 (excerpts from St. Margaret's curriculum); J.A. 633 ("Sometimes there are good sources of information, but other times the messages may not be accurate or present sexuality as special and important . . . shows we see on television or at the movies are not real life but make-believe and do not present sexuality as God

teenager who is somehow independently aware of abortion (and/or contraception) as an option may be too intimidated to inquire about either, because of the pervasively religious nature of the locale,[35] the presence of clergy performing religious functions or in their traditional garb,[36] the decided preference for childbearing and motherhood reflected in

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intended.")(emphasis in original). See also text and notes pp. 11-15 supra.

[35] For example, St. Margaret's Hospital contains crucifixes and religious symbols and statuaries throughout the buildings and grounds. J.A. 552-53 (Maisenbacher Affirmation); J.A. 485 (AFLA "program at one parochial school and a local Lutheran Church were held in rooms where religious symbols were displayed").

[36] See, e.g., J.A. 568 (Pastor William J. Ingersoll's letter confirms that the addressee of the letter will "meet with the parents and youth" to cover various topics, "followed by a brief presentation by myself of Biblical and theological views regarding sex.") For complete listing of instances in which clergy and/or visibly religious employees were present during orientations or the actual workshops, see R. 155, 61-62 n. 102 (Memorandum of Points and Authorities in Support of Plaintiffs' Motion for Summary Judgment).

program materials,[37] the often inaccurate and inflammatory description of the abortion procedure and its consequences,[38] the similarly inflammatory or inaccurate description of contraceptives,[39] or some combination of

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[37] See, e.g., L.D. 11 (Current grantee Christian Family Care Agency materials advise pregnant woman that abortion "is not the answer to a crisis pregnancy . . . . Deciding to give your baby life is a loving, courageous decision . . ."). See also J.A. 513 (Catholic Family Services AFLA grant application states that "[t]he client will not be counseled to terminate the pregnancy, although caseworkers do discuss a client's feelings about abortion and the detrimental effects abortion can have on the physical and emotional well-being of the client, as well as the destruction occurring to an unborn infant").

[38] See, e.g., pp. 26-29 and n. 14 supra. L.D. 77-78, 86-100 (Current grantee, A Woman's Choice distributes materials with facts and statistics by exaggerating the possibility of remote complications from abortions.)

[39] See, e.g., J.A. 522 (Student Evaluation of AFLA course states: "I don't think they should try to discourage kids from using birth control because the Church says not to. Some kids have made mature decisions and dwelling on what the Church says may give them a guilt trip . . . [the teacher] spent so much time on the natural family planning (rythm method) [sic] as a good thing because the Church approves it but she failed to mention

those factors. The dissemination of misinformation (or failure to provide essential information), in the "care" programs is particularly coercive as it takes place during the limited and stressful time period when a woman is deciding whether or not to continue her pregnancy. But even ir the "prevention" programs -- the teenage sexuality education programs -- the government preempts by hidden force the woman's decisionmaking process through systematic and calculated misinformation as well as other coercive strategies. The magnitude of the government's incursion on this decisionmaking process is all the greater because it affects women who are at a critical juncture in the formation of their personalities and moral development.

By funding such "education" and "care" programs, the AFLA clearly flouts this Court's

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that it is not good for teenagers to use this method -- it's not really safe.") (emphasis added).

frequently stated mandate that government refrain from exerting undue influence, through physicians or otherwise, on a woman's decisionmaking with respect to contraception and abortion. "The states," however, "are not free, under the guise of protecting maternal health or potential life, to intimidate women into continuing pregnancies." Thornburgh v. ACOG, 106 S. Ct. at 2178 (1986). Nor may government constitutionally discourage use of contraceptives by hiding or distorting information about them.[40]

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[40] In Carey v. Population Serv. Int'l, 431 U.S. 678, the State of New York sought to justify a statute prohibiting distribution of contraceptives to those under 16 on the basis that the law would deter sexual activity among minors in that age range. This Court flatly rejected such a rationale, taking judicial notice that minors do have sexual relations and with "frequently devastating" consequences. Id. at 695-96. Concurring in part and concurring in the judgment, Justice Stevens pointed out the danger and irrationality of imposing on individuals a rigid ideology that simply ignores reality:

> Although the State may properly perform a teaching function, it seems to me that an attempt to persuade by inflicting harm on

If forced ignorance and intimidation fail to keep the teenager from raising the question of abortion, the teenager who requests abortion counseling or referral cannot, by the terms of the statute, receive it unless both of her parents (or guardians) also "request" it. 42 U.S.C. Sec. 300z-10(b). This provision constitutes a further obstacle, which in practice operates, even for the mature and/or emancipated minor, as a parental consent requirement without the alternative avenues constitutionally required. Moreover, if a teenager, unaware of the anti-abortion restriction on funding, requests abortion

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> the listener is an unacceptable means of conveying a message that is otherwise legitimate. The propaganda technique used in this case significantly increases the risk of unwanted pregnancy and venereal disease. It is as though the State decided to dramatize its disapproval of motorcycles by forbidding the use of safety helmets. One need not posit a constitutional right to ride a motorcycle to characterize such a restriction as irrational and perverse.

Id. at 715.

services (or any other service, for that matter), the Act requires both notification to and permission of parents or guardians,[41] with only three narrow exceptions. 42 U.S.C. Sec.

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[41] The AFLA is touted as representing an "innovative" approach, depending primarily on "developing strong family values and attitudes of adolescents concerning sexuality and pregnancy . . ." 42 U.S.C. Sec. 300z-(a)(10)(A). When one compares the rhetoric, however, with the actual design of the statute it becomes apparent that family "values and attitudes" receive the government's approval only if they comport with the narrow anti-abortion ideological message which Congress intended to further by the Act. For example, Sec. 300z-5(a)(22)(A)(ii) provides that "in the case of a pregnant unemancipated minor requesting services from the applicant, the applicant will notify the parents or guardians of such minor . . . within a reasonable period of time . . . ." Yet, the Act also specifically prohibits parental notification in the case of a pregnant unemancipated minor if a grantee has reason to suspect that "such parents or guardians are attempting to compel such minor to have an abortion." Sec. 300a-5(a)(22)(C) (emphasis added). This provision is not a neutral one designed to protect the minors' fundamental rights to procreative choice-making free from compulsion. There is no corollary provision in the case of parents attempting to "compel childbearing and/or adoption." Clearly, Congress has determined that parental involvement is desirable only if the parents will further the statute's ideological agenda.

300z-5(22)(A),(B). In the case of abortion, this provision can only serve a punitive purpose, since the AFLA grantee by definition will not, in any event, provide such a service.

3. Given That it Interferes With Privacy Rights, The AFLA is Not Sufficiently Narrowly Tailored to Withstand Constitutional Scrutiny

Each of the barriers to access to or use of contraception built into the statute and manifested in the "prevention" and "care" programs is, independently, far more than a mere expression of policy favoring childbirth over abortion. See Harris v. McRae, 448 U.S. 297, 325 (1980); Maher v. Roe, 432 U.S. 464, 474 (1977). Rather, each acts as an affirmative, state-created obstacle in the path of a woman's right to decide for herself whether or not to bear a child. This right is no less fundamental for minor women than for adult

women.[42] Statutes burdening that right cannot withstand constitutional scrutiny unless they satisfy an "important" state interest, and unless the means are narrowly drawn to serve only that interest. See H.L. v. Matheson, 450 U.S. 398, 413 (1981). The legislative purpose of curtailing adolescent sexual activity may be an important state interest, but the strategy of achieving that purpose by promoting ignorance, fear, guilt and misinformation is not narrowly tailored to serve that

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[42] City of Akron v. Akron Center for Reproductive Health, 462 U.S. 416 (1983) (invalidating blanket rule which treats all minors under 15 as too immature to make abortion decision and which denies opportunity to show that abortion is in minor's best interests without parental consent); Bellotti v. Baird (Bellotti II), 443 U.S. 622 (1979) (no third party, including parents, may exercise absolute veto power over minor's decision to seek abortion); Planned Parenthood v. Danforth, 428 U.S. 52 (1976) (holding unconstitutional statute requiring that unmarried minors under 18 obtain parental consent for abortion).

interest, and indeed defeats that interest.[43] Experts on the subject have long recognized that adolescents do not respond well to moralizing and that the object of any teen pregnancy program must be clarification of an

---

[43] The premise of the AFLA is that there is a causal relationship between access to accurate information about contraception and increased promiscuity, and an increase in the rates of pregnancy, abortion and childbirth among teens. One expert on adolescent pregnancy calls this presumed relationship between family planning availability and increased promiscuity "spurious." She writes, "[t]here is no evidence that the availability of family planning services increases sexual activity among female teenagers; however, it does appear to improve contraceptive use and reduce their chances of having an unplanned pregnancy and out-of-wedlock birth.", Hofferth, The Effects of Program and Policies on Adolescent Pregnancy and Childbearing, reprinted in 2 Risking the Future: Adolescent Sexuality, Pregnancy, and Childbearing, 225, 260, (Hofferth & Hayes, eds., 1987)(National Research Council publication). Another study found that residence in a southern state was the most important predictor of high adolescent fertility and related that fact to, among other things, the higher proportion of Fundamentalists in that area and to the fact that southern states allot relatively little money to education and welfare and that abortions are less available in the South. Morgan, Interstate Variations in Teen Fertility, 2 Population Res. and Pol'y Rev. 72 (1983).

adolescent's own values. Studies as well as common sense indicate that if adolescents are made to feel guilty about sex, they will shun taking any precautions, since doing so would be tantamount to an admission of sexual activity:

> A conflict exists because the attitude of the adolescent is that sex is all right and the person or situation is right, but the moral code of most parents stipulates that premarital sex is wrong . Behaviorally, however, the adolescent is sexually active. The discrepancy that exists between actual behavior and moral upbringing is often evident in the percentage of adolescents who routinely do not use any type of birth control and are surprised when they become pregnant. The adolescents feel that if they do not use contraception and are swept away on the spur of the moment, then sexual behavior is acceptable. Planning sexual activity conflicts with the moral code of their parents and their own confused beliefs and values.

Tauer, Promoting Effective Decision Making in Sexually Active Adolescents, 18 Nursing Clinics of North America 276 (1983)(footnote omitted). Therefore, despite the government's

legitimate interest in reducing rates of adolescent pregnancy, the approach it has adopted through the AFLA is not likely to instill the sense of responsibility and autonomy in teenagers that many feel is essential to stemming the problem of unwanted teen pregnancy.

The emphasis on bringing out the adolescent's own values is based not only on the abstract ideal of respect for individual conscience,[44] but also on the practical realization that this is the only way for young adults to develop the self respect and self confidence necessary to act responsibly and with an understanding of the consequences of their acts: "The harmony between one's

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[44] The first amendment embodies a promise based on just that "abstract ideal"-- that under the newly-formed constitutional system, the federal government would be required to treat its citizens with respect. See Record Docket Entry 155 (Memorandum of Points and Authorities in Support of Plaintiffs' Motion for Summary Judgment 8-12).

beliefs and one's choices and the realization that the adolescent himself has made the choice will help him to be an active participant in his own health care." Tauer, supra p. at 280. This Court has recognized that the absolute imposition of external values on minors -- whether it be the values of parents, judges, physicians, or religion-- is constitutionally intolerable.[45] It is also a way to ensure minors' dependency and continued ignorance. More than a moral authority, "[t]he adolescent needs a neutral

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[45] In his concurring opinion in Bellotti v. Baird (Bellotti II), 443 U.S. 662 (1979), Justice Stevens noted the constitutional difficulties inherent in the judicial bypass procedure, which required that a judge apply the value-laden standard of "best interests of the minor." This standard was of little guidance, he wrote, because "[the judge's] decision must necessarily reflect personal and societal values and mores whose enforcement upon the minor -- particularly when contrary to her own informed and reasoned decision -- is fundamentally at odds with the privacy rights underlying the constitutional protection afforded to her decision." Bellotti II, 443 U.S at 655-56 (Stevens, J., concurring in judgment).

ally who can help her evaluate the pros and cons of various choices. Such an ally needs to be able to tolerate her ambivalence toward the pregnancy and her relationship to her parents and other significant authority figures." Adler, Sex Roles and Unwanted Pregnancy in Adolescent and Adult Women, 12 Professional Psychology 63 (1981).

The existence of successful programs which encourage teens to abstain from or delay sexual relations, but also counsel on birth control and abortion, should leave no doubt that Congress has not here chosen the least intrusive means for achieving the goal of promoting abstinence among teenagers. For example, "Teen Choice" is a sexuality education and counseling program conducted in seven New York City public schools by Inwood House, a home for unwed mothers. The program "encourages teens to delay having sex," but

> [s]ources for birth control are given when it becomes obvious that

> the girl plans to have sex -- with or without birth control. A similar process takes place if a girl turns to a counselor for advice on an abortion.
>
> "Whether we favor it or not is really irrelevant," said Dominique Moyse-Steinberg, a Teen Choice counselor at Brandeis. "What's really important is option counseling [to ensure] that what is done is done of her own free will."

Education Research Group, Teen Pregnancy: Impact on the Schools 50 (R. Weiner ed. 1987) (A Special Report).[46] In sum, by treating

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[46] Tauer echoes the theme of free will and focuses on the importance of treating adolescents as capable, independent moral and intellectual agents:

> If we believe that the only way to promote effective decision-making in adolescents is to help them to understand what is valuable in their own life and to use that as a base for making decisions, then we can no longer spoon-feed information to them. We must take into account the cognitive, social, emotional, and sexual development of adolescents, and only by being aware of them as growing, changing persons will we be able to effectively help them to choose how to live their lives. If their choice is to be sexually active and they are in accord with their beliefs and it is a choice that they have made freely, after

teenagers as morally and intellectually incompetent to make intimate decisions about their lives, the statute makes that harsh judgment a self-fulfilling prophecy.

Moreover, the AFLA is constitutionally defective in its requirement that both parents (or guardians) "request" abortion counseling or referral, in order for the adolescent to receive either. 42 U.S.C. Sec. 300z-10(a). This so-called "exception" is virtually

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> understanding all of the alternatives and accepting the outcome, then we must accept that choice. If their choice is not to be sexually active and is based on their own belief system and is a choice freely made by examining all the alternatives and understanding the outcome, then we must also support that decision. The health professional must strive to help adolescents learn to make decisions based upon their own beliefs and value systems, to guide them to an understanding of where they are in their development, to not moralize or preach; to understand what sexuality means to the adolescent and not merely to emphasize physiological aspects of sex.

Tauer, supra p. 51, at 280.

meaningless in light of the absolute prohibition on funding to groups that in any way countenance abortion.[47] Regardless of what the statute may permit technically, many AFLA-funded health care providers hold anti-abortion beliefs, and thus cannot, in accordance with those beliefs, provide the requested information. Even in the case of an AFLA-funded health care practitioner who may

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[47] See also Sec. 300z-5(22)(A)(i), requiring, subject to certain exceptions, that AFLA grant applicants provide assurances that they will "notify the parents or guardians of any unemancipated minor requesting services . . . [and] will obtain the permission of such parents or guardians with respect to the provision of such services." As for pregnant unemancipated minors requesting services, applicants must provide the additional assurance that parents will be notified "within a reasonable time." Sec. 300z-5(22)(A)(ii). This provision is, quite transparently, designed to deter minors who would prefer not to involve their parents, from requesting certain services, including abortion. Clearly, however, parental involvement is paid lip service only; it is hindered where parents favor the dissemination of honest abortion-related information as such involvement will not further the coercive purposes of the Act. See note 41 supra.

not strictly adhere to anti-abortion strictures, there is no mechanism in the statute to ensure that he or she will be made aware of the exception. See J.A. 550 (Maisenbacher Affirmation).[48]

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[48] Ms. Maisenbacher, a registered nurse formerly employed as a midwife in the AFLA-funded St. Margaret's Teenage Pregnancy Program, noted the inefficacy of the exception which she defined as requiring parental "consent":

> In my employment interview I was told both by Nancy Barrows, director of Nurse-Midwives, and the personnel director, that I would not be able to discuss either abortion or artificial family planning with my patients because to do so would breach the religious tenets of St. Margaret's. I was given a booklet entitled "Ethical and Religious Directives for Catholic Health Facilities", (Exhibit A). It was made clear to me that if the religious rules in this booklet were not followed I could lose my job. Although I understand that the Adolescent Family Life Act permits teenagers to get information and referral for contraceptives with parental consent, and abortion referrals upon parental request, I was not informed of this when I worked at St. Margaret's and it is clear that even providing such limited information would breach the

Moreover, the parental "request" exception, in practice, operates no differently than an unconstitutional parental consent requirement.[49] It represents the last of a series of obstacles set by the Act in the path of a woman attempting to make a personal decision. Minors have a right of access to information directly affecting their reproductive lives. Carey v. Population Serv.

> hospital rules as explained to me.

Id. at 550. (emphasis added).

[49] H.L. v. Matheson, 450 U.S 398 (1980), is not to the contrary. The statute upheld in that case required parental notice only "if possible," and the Court made clear that the Utah statute did not grant parents veto power over the minor's abortion decision, which would have been constitutionally impermissible. Id. at 411. The AFLA's vague "request" provisions, however, apparently require parents to come forward and, either orally or in writing, state an interest in receiving information about abortion. Obviously, parents would not do so unless they might approve of an eventual abortion. Moreover, the Matheson Court did not extend its holding to mature or emancipated minors, or to immature minors who could demonstrate that notification would be detrimental to their best interests. Id. at 406-07 n.14.

Int'l, 431 U.S. 678. Insofar as access to information is a prerequisite to the ability to obtain an abortion, the parental "request" requirement violates the well-established principle that where government requires parental consent to the minor's abortion decision, it "must provide an alternative procedure whereby a pregnant minor may demonstrate that she is sufficiently mature to make the abortion decision herself or that, despite her immaturity, an abortion would be in her best interests." City of Akron, 462 U.S. at 439-40.[50]

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[50] See Bellotti II, 443 U.S. at 644 (explaining that the judicial by-pass procedure would provide an alternative to parental consent whereby a minor would have an "effective opportunity" to secure an abortion with anonymity); Carey v. Pop. Serv. Int'l, 462 U.S. at 688-89 (holding that the right of access to contraceptives "is essential to exercise of the constitutionally protected right of decision in matters of childbearing that is the underlying foundation of the holdings in Griswold, Eisenstadt v. Baird, and Roe v. Wade"). See also Bolger v. Youngs Drug Products Corp., 463 U.S. at 69 (holding that the first amendment prohibits government from

The deliberate withholding of vital and accurate information about contraception and abortion required by the AFLA constitutes a state-created obstacle in the path of a woman's right to make her own reproductive life decision. Enforced ignorance is at least as formidable an obstacle in that path as criminal penalties (Roe); spousal consent requirements (Danforth); parental consent

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inhibiting the flow of truthful information where that information "relates to activity which is protected from unwarranted state interference").

It is immaterial that the AFLA does not bar all available channels through which adolescents may learn about abortion. The Constitution forbids government to exceed certain limits defined by this Court. It simply does not matter for constitutional purposes whether that limit has been exceeded partially or thoroughly. As this Court once explained in a slightly different context, "one is not to have the exercise of his liberty . . . abridged on the plea that it may be exercised in some other place." Schneider v. State, 308 U.S. 147, 63 (1939). See also Carey, 431 U.S. at 697 (1977) ("less than total restrictions on access to contraceptives that significantly burden the right to decide whether or not to bear children must also pass constitutional scrutiny").

requirements amounting to veto power (Bellotti I);[51] second-trimester hospitalization requirements (Akron); and distorted informed consent provisions (Akron, Thornburgh). The concerted effort of government and religion to impose one preferred set of values on young women operates as a subtle but profound veto on individual autonomy and self-determination.

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[51] Bellotti v. Baird, (Bellotti I), 428 U.S> 132 (1976).

CONCLUSION

This Court should affirm the district court judgment on establishment clause, free speech and privacy grounds and modify the order to strike down the AFLA in its entirety as unconstitutional.

Respectfully Submitted,

Sarah E. Burns
Counsel of Record
Sara L. Mandelbaum
Marsha Levick
NOW Legal Defense and
Education Fund
99 Hudson Street; 12th Floor
New York, NY 10013
(212)925-6635
and
1333 H Street, NW; 11th Floor
Washington, DC 20005
(202)682-0940

Counsel of record and amici curiae acknowledge and thank Jennifer C. Pizer, New York University Law School, J.D. 1987; Doreena Wong, New York University Law School, J.D. 1987; Anne Zinkin, New York University Law School, J.D. degree expected 1988; Lisa Swanson, Lyn McCoy and Lynn Thorp.

APPENDICES

A. Letters of Consent to the Filing of the Brief Amici Curiae

B. Interest of Amici Curiae

C. Certificate of Service by Counsel of Record

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APPENDIX A

Letters of Consent to the Filing of

the Brief Amici Curiae

U.S. Department of Justice
Office of the Solicitor General

Washington, D.C. 20530

February 1, 1988

Jennifer C. Pizer, Esquire
Legal & Research Director
National Abortion Rights
Action League
1101 14th Street, N.W., 5th Floor
Washington, D.C. 20005

Re: Bowen v. Kendrick, et al.
Nos. 87-253, 87-431, 87-462 and 87-775

Dear Ms. Pizer:

With regard to your letter of January 25, 1988, I hereby consent to the filing of an amicus brief in the above case on behalf of the NOW Legal Defense & Education Fund, the National Abortion Rights Action League, and possibly other organizations.

Sincerely,

Charles Fried

Charles Fried
Solicitor General

AMERICAN CIVIL LIBERTIES UNION FOUNDATION

REPRODUCTIVE FREEDOM PROJECT

132 West 43 Street
New York, NY 10036
(212) 944-9800

Janet Benshoof
DIRECTOR

Lynn M. Paltrow
Rachael N. Pine
STAFF COUNSEL

Dana Traub
PARALEGAL
PUBLIC EDUCATION

Norman Dorsen
PRESIDENT

Ira Glasser
EXECUTIVE DIRECTOR

February 8, 1988

Jenny Pizer
Legal & Research Director
N A R A L
1101 14th Street, N.W.
5th floor
Washington, D.C. 20005

re: Bowen v. Kendrick
87-253, 87-432,
87-462, 87-775

Dear Ms. Pizer:

Pursuant to your request, Cross-Appellants Chan Kendrick et al., herein consent to the filing of a brief amicus curiae in the above-captioned case by the NOW Legal Defense & Education Fund, the National Abortion Rights Action League, and such other groups as may wish to join.

Sincerely,

Janet Benshoof
Attorney for Cross-Appellants

JB/hs

THE UNIVERSITY OF CHICAGO
THE LAW SCHOOL
1111 EAST 60TH STREET
CHICAGO • ILLINOIS 60637

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FEB 4 1988

February 1, 1988

Ms. Jennifer C. Pizer
Legal & Research Director
NARAL
1101 14th Street, N.W., 5th Floor
Washington, DC 20005

Dear Ms. Pizer:

On behalf of United Families of America, I am happy to give my consent to your filing an amicus curiae brief in Bowen v. Kendrick and the consolidated cases, Nos. 87-253, 87-431, 87-462, and 87-775.

Very truly yours,

Michael W. McConnell
Assistant Professor of Law
Counsel of record, United
Families of America

APPENDIX B

Interest of Amici Curiae

INTEREST OF AMICI CURIAE

The NCW Legal Defense and Education Fund (NOW LDEF) is a non-profit civil rights organization that performs a broad range of legal and educational services nationally in support of women's efforts to eliminate sex-based discrimination, secure equal rights, and preserve reproductive options under law.

The National Abortion Rights Action League (NARAL) is a national organization with more than 200,000 members in 34 state affiliates and the national organization. Because NARAL believes that reproductive self-determination is central to the lives and health of women, NARAL educates the public and policymakers about the importance of creating social conditions that allow women to exercise freely the full range of their reproductive choices.

The American Association of University Women, a national organization of over 150,000 women and men, is strongly committed to achieving legal, social, and economic equity for women. AAUW supports basic constitutional rights for all persons, including first amendment rights of free speech and separation of church and state, the right to privacy, and equal protection under the law. The right to reproductive choice continues to be a priority issue for AAUW.

The American Humanist Association is a non-profit national educational organization of persons in every state of the Humanist philosophy. The AHA strongly supports freedom of conscience and the principle of separation of church and state. The AHA believes that the AFLA violates both the establishment clause and the right to privacy protected by the fourteenth amendment.

Americans for Religious Liberty is a nation-wide, non-profit, educational public interest organization dedicated to defending religious liberty, freedom of conscience, and the constitutional principle of separation of church and state. ARL believes that the AFLA violates the establishment clause by providing tax support to sectarian institutions and violates the privacy rights of intended beneficiaries by providing them with distorted information.

The Black Women's Agenda is a private non-profit organization which aims to improve the status of black women and their families. The BWA is interested in Bowen v. Kendrick because of AFLA's impact on low-income black girls and their access to information consistent with reproductive freedom.

B'nai B'rith Women, Inc., founded in 1897, is a non-profit charitable, religious, and educational organization of over 125,000 women. Among its purposes, as reflected in its bylaws, is to "give guidance to youth on the broadest principles of humanity." It has implemented that purpose through a specific program designed to meet the rise of teenage pregnancies through educational programs for parents and adolescents.

The Center for Law and Social Policy is a public interest law firm which provides representation to women, minorities, the disabled, and the poor on issues of family law and policy. Our work has confirmed that teen pregnancy can have especially devastating consequences for poor teenagers and lead to economically insecure families. In light of this reality, a crucial component of any rational family planning policy must be the preservation of service providers' flexibility to offer counseling to pregnant teenagers that gives them the ability to make informed choices best suited to their circumstances.

The Committee to Defend Reproductive Rights is a San Francisco, community-based organization with 1,000 members throughout California and several other states. For ten years, CDRR has been dedicated to insuring women's reproductive freedom by engaging in public education issues concerning reproductive rights. CDRR supports and defends the reproductive right and freedom of all women, including young women.

Equal Rights Advocates, Inc. is a San Francisco-based public interest legal and educational corporation dedicated to working through the legal system to end discrimination against women. It has a long history of interest, activism and advocacy in all areas of the law which affect equality between the sexes. ERA believes that the right to control one's reproductive life is fundamental to women's ability to gain equality in other aspects of society.

The National Emergency Civil Liberties Committee is a non-profit organization, dedicated to the preservation and extension of civil liberties and civil rights. Founded in 1951, it has brought numerous actions in the federal courts to vindicate constitutional rights. Through its educational work, it likewise has sought to preserve our liberties. From time to time, the NECLC submits amicus curiae briefs to the Court when it believes issues of particular import to civil liberties are at stake.

The National Organization for Women (NOW) is a national membership organization of approximately 150,000 women and men in about 700 chpaters throughout the country. It is a

leading advocate of women's equality in all areas of life. NOW has as one of its priorities the preservation of the right to reproductive freedom, including abortion.

The National Women's Health Network serves as an advocate for women whose voices are not heard in the creation of health policies at the federal level. Given that young women's health education needs were to be a goal of this federal program, the National Women's Health Network wishes to voice its concern that young women's needs be truly met and not encumbered by religious teachings.

The National Women's Political Caucus is a non-profit corporation supporting the election and appointment of women to public office. It also supports legislative and public policy issues of concern to women, such as freedom of choice an reproductive rights, the Equal Rights Amendment and economic and legal equity for women.

The Northwest Women's Law Center is a private, non-profit organization in Seattle, Washington, that works to advance the legal rights of women by means of litigation, education, and providing information and referral. Protecting women's freedom of reproductive choice is one of the Law Center's priority issue areas. The Law Center has participated in several cases involving reproductive rights before the U.S. Supreme Court.

The United States Student Association is a student advocacy service, representing over 3 million students and over 400 universities and colleges around the United States. USSA is in favor of a woman's right to choose and of reproductive freedom because an unwanted pregnancy can restrict a woman's access to higher education.

Voters for Choice is the only national, independent pro-choice political action committee. Voters for Choice works directly with campaigns, providing both contributions and vital technical assistance to candidates in dealing with reproductive rights issues.

The Women's Law Project is a non-profit feminist law firm dedicated to advancing the status and opportunities of women through public education, litigation, advocacy and research. The WLP has played a leading role in defending reproductive rights in the courts, including representing plaintiff women and medical providers in Thornburgh v. ACOG, ____ U. S. ____, 106 S.Ct. 2168 (1986).

The Women's Legal Defense Fund is a tax-exempt non-profit membership organization founded in 1971 to challenge sex-based discrimination and to advance women's concerns through the legal system. WLDF has worked extensively on issues of reproductive freedom.

Zero Population Growth is a national non-profit, membership organization that works to mobilize broad public support for population stabilization both in the U.S. and worldwide. ZPG supports laws and social practices that ensure access for all women to voluntary family planning services as well as medically safe and affordable abortion services.

APPENDIX C

Certificate of Service by Counsel of Record

CERTIFICATE OF SERVICE

I hereby certify that I have caused three copies of the foregoing Brief of Amici Curiae NOW Legal Defense and Education Fund, et al., together with a copy of the Lodged Documents referenced therein at note 2, to be served by first class mail postage prepaid upon:

Counsel of Record for Appellant Bowen
Charles Fried
Solicitor General
U.S. Department of Justice
Washington, D.C. 20530

Counsel of Record for
United Families of America
Michael W. McConnell
University of Chicago Law School
1111 East 60th Street
Chicago, Illinois 60637

Counsel of Record for
Chan Kendrick, et al.
Janet Benshoof
ACLU-Reproductive Freedom Project
132 West 43rd Street
New York, New York 10036

on or before February 13, 1988.

s/
Sarah E. Burns
Counsel of Record for Amici Curiae
NOW Legal Defense and
Education Fund, et al.

APPENDIX D

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INDEX TO LODGED DOCUMENTS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES,
Appellant,

—v.—

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Appellees.

Caption continued on Inside Front Cover

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF OF THE AMERICAN PUBLIC HEALTH ASSOCIATION, AMERICAN PSYCHOLOGICAL ASSOCIATION, PLANNED PARENTHOOD FEDERATION OF AMERICA, INC., AND NATIONAL FAMILY PLANNING & REPRODUCTIVE HEALTH ASSOCIATION, INC. AS AMICI CURIAE IN SUPPORT OF APPELLEES AND CROSS-APPELLANTS

Of Counsel:

NADINE TAUB
Rutgers University School
of Law
15 Washington Street
Newark, New Jersey 07102

JUDITH LEVIN
Rabinowitz, Boudin, Standard,
Krinsky & Lieberman
740 Broadway
New York, New York 10003

JOHN H. HALL
(Counsel of Record)
MARY SUE HENIFIN
DEBEVOISE & PLIMPTON
875 Third Avenue
New York, New York 10022
(212) 909-6000

Attorneys for Amici Curiae American Public Health Association, American Psychological Association, Planned Parenthood Federation of America, Inc., and National Family Planning & Reproductive Health Association

February 13, 1988

UNITED FAMILIES OF AMERICA,

Appellant,

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INTERESTS OF AMICI CURIAE

The American Public Health Association ("APHA") is a national organization devoted to the promotion and protection of personal and environmental health and to disease prevention. Founded in 1872, APHA is now the largest public health organization in the world, with over 50,000 members, including 51 state and local affiliate organizations. The APHA represents all disciplines and specialties in public health, including consumers and health professionals such as physicians, nurses, health educators, and family planning specialists. APHA members seek to develop health policy that ensures equitable and quality health care for all, including pregnant and sexually active adolescents. The APHA has a particular interest in the Court's resolution of this case because the challenged Adolescent Family Life Act contradicts numerous APHA policy statements, including those supporting accurate public information on abortion (No. 8524), the right to informed consent (No. 7839), and counseling on all contraceptive methods in family planning programs (No. 8304).

The American Psychological Association ("APA"), a nonprofit scientific and professional organization founded in 1892, is the major association of psychologists in the United States. APA has more than 60,000 members, including the vast majority of psychologists holding doctoral degrees in the United States. APA's purposes are to advance psychology as a science and profession, and to promote human welfare. A central function of APA is to establish ethical standards and guidelines for the delivery of psychological services, including counseling on reproductive options. The Ethical Principles of Psychologists have been incorporated in the laws of most states, thus governing the professional conduct of psychologists licensed in those states.

Planned Parenthood Federation of America, Inc. ("PPFA"), organized in 1922, is the leading voluntary public health organization in the field of family planning. PPFA's 181 affiliates in 43 states operate over 700 family planning clinics offering services to the public. Most affiliates offer medical

services and 48 include abortion services as part of their program. Most affiliates that do not perform abortions offer pregnancy counseling and referral. All affiliates offer educational and informational services in voluntary fertility control. PPFA opposes restrictions on the accessibility of reproductive information and services because such restrictions are contrary to the public health and welfare. The adverse impact of an unwanted pregnancy is particularly acute for the adolescent because an early pregnancy entails substantial medical risks and often significantly limits her educational and career opportunities.

The National Family Planning and Reproductive Health Association, Inc. ("NFPRHA") is concerned with the improvement and expansion of family planning and reproductive health care services throughout the United States. Among NFPRHA's 900 members are consumers and health care professionals, including State, county and city health departments, Planned Parenthood Federation of America affiliates, hospital-based clinics, "umbrella" family planning councils, independent, free-standing family planning clinics and other family planning organizations and providers. Many of NFPRHA's members have sought AFLA funds and been denied because they refuse to abide by the anti-abortion and parental consent provisions. Other members have not even applied for AFLA funding, despite clear capabilities to deliver services under the Act, because they feared or were told that they had no chance of receiving funding on account of their objections to the anti-abortion and parental consent provisions.

This case raises issues concerning limits on the information that may be communicated to adolescents who are or may become sexually active, or pregnant. Many of the members of amici have conducted research on effective and ethical education for adolescents on sexuality, family planning, pregnancy, and abortion. The issues raised are of particular interest to amici because of their commitment to public health and their expertise in reproductive health education and counseling.

This brief is filed pursuant to Rule 36.2 of the Rules of the Court. The parties have consented to its submission in letters on file with the Clerk of the Court.

INTRODUCTORY STATEMENT

Amici urge affirmance of the district court's finding that the Adolescent Family Life Act, 42 U.S.C. § 300z *et seq.* [hereinafter AFLA or the Act] is unconstitutional insofar as it requires the participation of religious organizations in AFLA programs. In addition, amici suggest that the statute presents such constitutionally sensitive questions as whether the AFLA is consistent, on its face and as applied, with the constitutional right to make reproductive decisions free from government interference.

When it enacted the AFLA, Congress recognized the manifold problems of adolescent pregnancy. The Act recites that pregnant adolescents experience:

> a higher percentage of pregnancy and childbirth complications; a higher incidence of low birth weight babies; a higher infant mortality and morbidity; a greater likelihood that an adolescent marriage will end in divorce; a decreased likelihood of completing schooling and higher risks of unemployment and welfare dependency. . . .

42 U.S.C. § 300z(a)(5). Unfortunately, Congress ignored these real concerns of adolescent pregnancy and childbirth and instead enacted a law which is not only medically unsubstantiated but violates the fundamental constitutional rights of pregnant adolescents.

The AFLA was enacted to serve several purposes:

> (1) finding effective means, within the context of the family, of reaching adolescents before they become sexually active in order to maximize the guidance and support available to adolescents from parents and other family members, and to promote self discipline and other prudent approaches to the problem of adolescent premarital sexual relations, including adolescent pregnancy;
>
> (2) promoting adoption as an alternative for adolescent parents;
>
> (3) establishing innovative, comprehensive and integrated approaches to the delivery of care services for pregnant adolescents;
>
> (4) supporting research and dissemination of research results on the causes and consequences of adolescent premarital sexual relations, contraceptive use, pregnancy and childrearing.

42 U.S.C. § 300z(b).

To meet the purposes of the AFLA, grants are made to public and nonprofit organizations to fund "prevention services" for the prevention of premarital adolescent sexual relations and "care services" for the provision of care to pregnant adolescents and adolescent parents. 42 U.S.C. § 300z(1)(a) 7 & 8. Among the applicants' specific obligations under the AFLA is the involvement of religious organizations in the provision of services.[1] The merit of each grant application is judged on how

---

1 Section 300z-5(a)(21)(B) requires that applicants provide

> a description of how the applicant will, as appropriate in the provision of services . . . involve *religious and charitable organizations*, voluntary associations, and other groups in the private sector as well as services provided by publicly sponsored initiatives (emphasis added).

The Committee Report accompanying the bill passed to extend the AFLA explains:

> "Current law *requires* applicants to involve religious and charitable organizations . . . in the development of projects and in the delivery of services."

Committee on Labor and Human Resources, The Adolescent Family Life Act, S. Rep. No. 496, 98th Cong., 2d Sess. 9-10 (1984) (emphasis added).

effectively the applicant demonstrates the involvement of religious organizations.[2]

In conjunction with its mandate to involve religious organizations, the AFLA prohibits the delivery of information on abortion.[3] The only exception to the abortion prohibition is a provision that pregnant adolescents may receive referral for abortion counseling if both the "adolescent and the parents or guardians of such adolescent request such referral." 42 U.S.C. § 300z-10. While banning information on abortion, the Act instructs grantees to provide adolescents information about adoption. 42 U.S.C. § 300z-1(a)(4)(B) & (G)(i).

Only programs that provide biased and incomplete information about the options available to pregnant adolescents are funded by the Act. The AFLA thus not only violates the

---

2 Reviewers of grant applications emphasized religious involvement in their evaluations of the strengths and weaknesses of applicants' proposals. They found, for example, that the "biggest weakness" of San Diego University Foundation's application was "no discussion of moral values or spiritual development. . . . No research plan to do . . . 'church attendance' level assessment of previous and post-intervention level of moral and spiritual development on activity rate." Similarly, Baltimore City's application was criticized for "[l]acking . . . the kind of counseling that you get in Catholic Social Services." Another reviewer noted that "[n]o experts on transcendental (the most effective) Judeo-Christian values is represented in the development or teaching of this proposal." JA at 509-511.

Summaries prepared to explain why applicants were rejected also focused on the absence of religious involvement. Lake Cumberland District Health Department was found lacking because it "promised no involvement of religious groups." R. 155, App. Vol. IA, 505-D. Junior Education of Tomorrow was criticized for not providing "evidence that local churches or pastoral help and training will be used." *Id.* at 505-E. The Family Health Foundation of Alviso, California failed to demonstrate "inclusion of religious/charitable organizations." *Id.* at 505-F.

3 Section 300z-10(a) requires that:

> Grants or payments may be made only to programs or projects which do not provide abortions or abortion counseling or referral, or which do not subcontract with or make any payment to any person who provides abortions or abortion counseling or referral . . .; and grants may be made only to projects or programs which do not advocate, promote, or encourage abortion.

constitutional rights of pregnant adolescents but has profound negative consequences for adolescent health.

Summary of Argument

This Court has repeatedly recognized that the government may not interfere with the constitutionally protected right to make procreative decisions by dictating the contours of the dialogue between a woman and her health care providers. By requiring the involvement of religious organizations and prohibiting any discussion of abortion, the AFLA manipulates impermissibly the provision of information about prudent approaches to adolescent sexuality and pregnancy, and thus violates this right.

Although one of the stated purposes of the AFLA is to encourage and provide for the dissemination of information about adolescent sexuality and pregnancy, the Act prevents physicians and other health care professionals from providing accurate information about the physical and psychological risks of various procreative options, including abortion. In this respect the AFLA requires deviation from accepted professional standards. In fact, only full discussion of factual information about the entire range of reproductive and contraceptive options permits a constitutional free choice and enhances development of responsible adolescent decision-making about sexuality and childbirth.

By requiring grantees to involve religious organizations in sex education and pregnancy counseling and, at the same time, prohibiting those grantees from communicating information about abortion, the AFLA grants preferences to those religions that teach the impermissibility of abortion. Moreover, the government, having opened a channel for communication about adolescent pregnancy, may not, consistent with the First Amendment, discriminate among the options that may be communicated. No compelling government interest can be offered sufficient to justify the AFLA's favoring either certain religions or certain viewpoints about abortion over others.

I. THE ADOLESCENT FAMILY LIFE ACT IMPERMISSIBLY INTERFERES WITH AN ADOLESCENT'S CONSTITUTIONAL RIGHT TO MAKE INFORMED REPRODUCTIVE DECISIONS.

A. The AFLA Compels Grantees to Provide Distorted Information in Violation of a Woman's Fundamental Constitutional Right to Make an Informed Reproductive Choice Free of Government Coercion.

This Court has held that "the right of privacy, grounded in the concept of personal liberty guaranteed by the Constitution, encompasses a woman's right to decide whether to terminate her pregnancy." *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 419 (1983). Moreover, this Court has repeatedly protected women's right to decide by rejecting states' attempts to interfere with a woman's decision-making process. It has taken a particularly harsh view of state efforts to insinuate itself into the decision-making process by controlling the content of the patient-physician relationship.

In *Akron*, for example, the Court struck down an ordinance requiring physicians to furnish pregnant women contemplating abortion with certain specific information, some of which was misleading. The Court held that this requirement was an unconstitutional attempt by the state "to influence the woman's informed choice between abortion and childbirth." 462 U.S. 416, 447. Again, in *Thornburgh v. American College of Obstetricians and Gynecologists*, ____ U.S. ____, 106 S.Ct. 2169 (1986), the Court rejected Pennsylvania's attempt to insert itself into the "privacy of the informed-consent dialogue between the woman and her physician" by requiring physicians to convey specified information to their patients. 106 S.Ct. at 2179.

The Court found the Akron and Pennsylvania laws constitutionally defective for two reasons. First, they required physicians to convey information that was designed to influence a woman's choice between abortion and childbirth. Second, they placed a "straitjacket" on the informed-consent dialogue between a woman and her physician.[4] *Thornburgh*, 106 S.Ct. at 2179 (quoting *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 67 n.8 (1976)).

The two reasons that this Court articulated for invalidating the laws at issue in *Thornburgh* and *Akron* apply with equal force to the AFLA. First, the Act delivers pregnant adolescents misinformation by requiring doctors or other experts to omit critical facts about abortion alternatives when counseling them on pregnancy; like the information provided in *Akron* and *Thornburgh*, these omissions are obviously designed to deter adolescents from choosing abortion. Second, it "straitjackets" physicians and health care professionals, requiring them to reject accepted medical practice, the guidelines promulgated by their professions, and the health interests of their patients.[5]

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4 This Court's decisions in *Maher v. Roe* and *Harris v. McRae* do not validate the kind of active state interference with a woman's reproductive choice that the AFLA represents. *Harris v. McRae*, 448 U.S. 297 (1980); *Maher v. Roe*, 432 U.S. 464 (1977). *Maher* and *Harris* stand for the proposition that, while a woman has a right to choose an abortion, she does not have a right to compel the state to pay for the abortion simply because it has chosen to pay for childbirth. Central to these decisions was the fact that the women affected were no less able to exercise their constitutional right under the challenged funding scheme than if the government had provided no benefits at all.

The AFLA, however, does more than passively refuse to subsidize abortions or programs that encourage abortions. It invades the realm of privacy protected by this Court—the *process of deciding* whether to bear a child. By funding programs that provide pregnancy counseling so long as they deliver no information about abortion, the Act requires the transmission of incomplete and misleading information to pregnant women. It thereby precludes them from exercising a knowing and intelligent bearing choice. *Akron* and *Thornburgh* demonstrate that the government's efforts in the AFLA to manipulate a woman's reproductive choice by controlling the content of the patient-physician dialogue are unconstitutional.

5 Although most cases concerning abortion counseling deal with licensed physicians, the principles underlying those decisions apply to the consultative programs subsidized by the AFLA. Doctors in hospitals or clinics funded under the Act are subject to its restrictions. Moreover, even when counseling is conducted by non-physicians, the services provided are

1. The AFLA Both Intrudes on the Discretion of Health Professionals and Distorts Information Given to Pregnant Adolescents in Order to Deter Them From Choosing Abortion

The AFLA requires physicians and other health professionals in funded programs to withhold customary and relevant medical information to pregnant adolescents in their care. A governmental proscription on the provision of abortion information intrudes on the discretion of health care providers and interferes with a woman's procreative choice as effectively as a state requirement that certain kinds of information be provided.

One way in which the Act "straitjackets" counselors and misleads adolescents in their care is by forbidding full disclosure of the relative risks and options to an adolescent, who, for health reasons, should avoid childbirth. For example, a pregnancy counselor who is funded under the Act cannot inform an adolescent who suffers from chronic renal disease that she is at increased risk of morbidity and mortality unless she chooses to terminate the pregnancy.[6] Similarly, adolescents afflicted with cancer, diabetes, heart problems, sickle cell anemia, and hypertension cannot be informed by their physicians that abortion may be medically indicated. JA 527-528.

In addition, an adolescent who tests positive for antibodies to the AIDS virus will not receive the information she needs to make an informed procreative choice. A woman who tests

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functionally identical to those provided within a doctor-patient relationship. *See Akron*, 462 U.S. at 448 (recognizing the similarity between abortion counseling by physicians and other qualified professionals and holding that a state may not require that counseling be conducted by physicians). It would be illogical to allow the government to intrude on the dialogue between a woman and her health counselor merely because the woman is being advised by a non-physician.

6 *See* Kreuter & Hollingsworth, *Adolescent Obstetrics and Gynecology* 192-93 (1978).

positive may be more likely to develop AIDS Related Complex ("ARC") or AIDS if she carries a pregnancy to term. Thus, termination of the pregnancy may reduce the risk of AIDS or ARC to the adolescent. Moreover, approximately one-third to one-half of the infants born to AIDS-infected mothers will also be infected with the AIDS virus[7] and, because there is no known treatment to prevent fetal transmission, abortion is the only way to avoid the heartbreak and trauma of giving birth to an infant with AIDS. Thus, morbidity and mortality may result from the AFLA's prohibition on abortion counseling in such cases.

The AFLA's prohibition on abortion information also hampers the ability of physicians and counselors to provide genetic counseling. Any responsible counseling in the area of genetic diseases, where the condition is detectable prenatally, requires discussion of abortion.[8] For example, at the time a patient receives health care, tests or her medical history may reveal that she is at increased risk of giving birth to a child with a genetic disability such as Sickle Cell Anemia or Tay Sachs

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7 United States Department of Health and Human Services, *Surgeon General's Report on Acquired Immune Deficiency Syndrome* 20-21 (1987). The American College of Obstetricians and Gynecologists also states that women with antibodies to the AIDS virus "must" be counseled that if they become pregnant, the pregnancy may precipitate illness and that women infected with the AIDS virus "must understand that the probability is 20-50% that they will transmit infection perinatally to their fetus or newborn. . . . Those who do become pregnant should be counseled again about the risks to themselves and their child and should be informed about the option of pregnancy termination." ACOG Committee on Obstetrics: Maternal and Fetal Medicine and Gynecologic Practice, *Prevention of Human Immune Deficiency Virus Infection and Acquired Immune Deficiency Syndrome*, June 1987.

8 *See* Fletcher, Berg & Tranoy, *Ethical Aspects of Medical Genetics*, 27 Clinical Genetics 199, 201 (1985); and Powledge & Fletcher, *Guidelines For Ethical, Social, and Legal Issues in Prenatal Diagnosis*, 300 New England J. Med. 168, 169 (1979) (the genetic counselor, out of respect for patient autonomy, should provide complete information on various options, including abortion).

disease. She will, of course, want and need to know what options are available to her to make an informed choice for herself between abortion and carrying the pregnancy to term. The AFLA prevents a physician from informing the patient of the availability of amniocentesis to test her fetus for genetic disability, and the option of abortion if the fetus is diagnosed with such a disability. As a result, she too is compelled to make her procreative choice on the basis of misleading information.

The AFLA would also bar full disclosure of the relative risks and options to an adolescent who, for health reasons, wishes to consider alternative forms of contraception. For example, adolescents who have a history of risk factors for thromboembolic disorders should be advised by their physicians that use of oral contraceptives may increase their risk of pulmonary embolism and stroke.[9] A full discussion of alternatives, including barrier contraceptive methods such as the diaphragm and condom, must include their higher failure rates. The physician would be precluded under the AFLA from accurately responding to questions from the patient on the relative risks of using various methods of birth control with abortion as a back-up if the method of choice fails.[10]

The Act likewise prohibits counselors from informing teenagers impregnated during a rape or as a result of parental incest of the option to abort a pregnancy. This prohibition applies even if the counselor believes that carrying a pregnancy

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9 *See* Lavery & Sanfilippo, *Pediatric and Adolescent Obstetrics and Gynecology* 238-39 (1985).

10 In fact, a physician or counselor could not accurately describe mortality risks for various methods for avoiding the birth of a child, since abortion is one of those methods. The physician would be prohibited from communicating the view that use of barrier methods with the back-up of an early abortion is the safest method of contraception. *See* Tietze, Bongaarts & Schearer, *Mortality Associated with the Control of Fertility*, 8 Family Planning Perspectives (1976); The Alan Guttmacher Institute, *Making Choices—Evaluating the Health Risks and Benefits of Birth Control Methods* (1983) [hereinafter *Making Choices*].

to term would be traumatic for the adolescent and cause her lasting psychological damage.[11]

The Act interferes with pregnant adolescents' constitutional rights by requiring physicians and other health care professionals to deviate from accepted medical and psychological standards. The ethical and professional guidelines of the American Public Health Association, the American Medical Association, the American Psychological Association, and Planned Parenthood Federation of America mandate the accurate and complete communication of treatment alternatives, including information to a pregnant woman about abortion.[12] Health

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11 Section 300z-10(a) does allow recipients of funds to make referrals for abortion counseling, but only if the adolescent *and both* parents or the guardian of such adolescent request it. A blanket provision requiring the consent of parent or guardian as a condition for access by a minor to an abortion has been held unconstitutional by this Court. *Akron*, 462 U.S. at 440; *Bellotti v. Baird*, 443 U.S. 622, 642-44 (1979) [hereinafter *Bellotti II*]. The same principles that prohibit governments from placing an absolute third-party veto in the way of a minor's obtaining an abortion should prohibit government's granting parents an absolute veto on a minor's decision to obtain counseling for an abortion. The practical effect of requiring parental consent for abortion referral is that a mature minor who seeks an abortion may not be able to obtain one. The Act's failure to take a more individualized approach in assessing the competency and maturity of minors violates the constitutional right of privacy held by mature minors. *Bellotti II* at 643-44 and n.23. Section 300z-10 inflicts even greater harm on those minors whose health is endangered by pregnancy. It ensures that these adolescents will never even learn of the option to abort.

12 The APHA has issued guidelines stating:

> education about abortion procedures and services should be the responsibility of all health agencies and professionals concerned with the care of women. . . . Individuals contemplating abortion should be encouraged to seek information and counseling from the best available source. Educational literature on abortion should be easily obtained. . . . The medical professional has an obligation to establish referral relationships for the provision of abortion as with any other specialized medical services.

APHA Recommended Program Guide for Abortion Services (Revised 1979), 70 Am. J. Public Health 652, 653 (1980). *See also* American College of

care providers who fail to adhere to the principles of their professional organizations may risk professional censure.[13] Moreover, failure by physicians to achieve informed consent through full disclosure of relevant information and options is a form of medical malpractice, subject to state law sanctions governing medical negligence.[14]

Obstetricians and Gynecologists, *Standards for Obstetric-Gynecologic Services* (1985) ("In the event of an unwanted pregnancy, the physician should counsel the patient about her options of continuing the pregnancy to term and offering the infant for legal adoption, or aborting the pregnancy."); American Academy of Pediatrics, *Pregnancy and Abortion Counseling*, 63 Pediatrics 920, 921 (1979) (all options, including abortion, should be explored with pregnant teenagers); American Psychological Association, *Ethical Principles of Psychologists*, 36 Am. Psychologist 580, 633-38 (1981) (Resolution that termination of pregnancy be considered a civil right of the pregnant woman"); Planned Parenthood Federation of America, *Medical Standards and Guidelines* (1987); American Medical Association, *Current Opinions of the Judicial Council of the American Medical Association* (1984) (Sections 8.04, 8.07, 8.11); American Psychiatric Association, *Principles of Medical Ethics with Annotations Especially Applicable to Psychiatry* (1981). The APHA guidelines stress that it is essential to provide information about risks and alternatives to a pregnant woman when she seeks health care because failure to do so may delay her in obtaining abortion information and referral. For each week of delay, the risk of complications after a legal abortion increases 20%; the risk of death increases approximately 50%. 70 Am. J. Public Health 654 (1980).

13 Current Opinions of the Judicial Council of the American Medical Association (1984) (physicians may be suspended or expelled from the AMA for violation of ethical standards such as failure to follow informed consent principles).

14 President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research, *Making Health Care Decisions: A Report on the Ethical and Legal Implications of Informed Consent in the Patient-Practitioner Relationship* 16 (1982). Failure to inform potential parents of the risk of genetic disability and the option of abortion is a form of medical malpractice. *Harbeson v. Parke-Davis, Inc.*, 656 P.2d 483 (Wash. 1983); *Berman v. Allan*, 404 A.2d 8 (N.J. 1979), *overruled on other grounds*, *Procanik v. Cillo*, 478 A.2d 755 (N.J. 1984); *Becker v. Schwartz*, 46 N.Y.2d 401, 386 N.E.2d 807 (1978). Adolescents are capable of informed consent—they are, on the average, indistinguishable from adults in their ability to understand and reason about health care alternatives, including whether or not to terminate a pregnancy. Weithorn & Campbell, *The Competency of Children and Adolescents to Make Informed Treatment Decisions*, 53 Child Development 1589 (1982). Melton & Pliner, *Adolescent Abortion* in Adolescent Abortion 18-19 (Melton, ed. 1986).

2. The Distorted Counseling Required by the AFLA Interferes With An Adolescent's Right to Make Reproductive Choices.

The AFLA strikes at the heart of the right announced in *Roe v. Wade*, 410 U.S. 113 (1973), and reaffirmed in *Akron* and *Thornburgh*: the right to be free from unwarranted state interference in the process of deciding, in consultation with experts, whether or not to bear a child. By requiring physicians and health professionals in funded programs to withhold relevant health information from pregnant adolescents, the AFLA misleads adolescents and prevents them from making an informed choice between childbirth and abortion. By disseminating information on the benefits of adoption, while barring access to data on abortion, the AFLA renders an adolescent in an AFLA program less capable of making an independent reproductive choice than she would be if the program did not exist. Thus, the AFLA infringes on the due process right of women to make a free and informed choice between abortion and childbirth.

B. The Government Cannot Demonstrate that the AFLA Serves Any Interest Sufficient To Justify Its Interference With A Fundamental Right.

This Court has held that the state's interest in protecting adolescents from an *uninformed*, immature choice will justify increased regulation of a minor's access to abortion. *Bellotti II*, 443 U.S. at 635 (1979). Not only does the AFLA not serve this interest, it actually undermines it. By censoring informa-

tion on abortion, even to those teenagers with life-threatening pregnancies, and encouraging childbirth in every instance, the AFLA can hardly be said to protect minors from their immaturity. Rather, by disseminating misinformation, the Act exploits the vulnerability of adolescents.

Nor can the government justify the abortion and adoption provisions of the AFLA on the grounds that they protect physical and psychological health. Such a claim lacks any empirical foundation for three reasons: adolescent childbirth presents more health risks than abortion; the children born to adolescents experience higher rates of physical and psychological problems; and unwanted childbirth limits the career aspirations of adolescents.

In terms of risks to life and health, the abortion procedure is safer than continued pregnancy and childbirth. At eight weeks of gestation or earlier, the risk of death from abortion is about 20 times lower than that of childbirth, and at no point in pregnancy is abortion more dangerous than childbirth.[15] Finally, abortion is rarely followed by significant medical sequelae.[16]

Teenage mothers, particularly younger ones, are, however, at particular risk from pregnancy and childbirth.[17] Adolescent

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15 *See* LeBolt, Grimes & Cates, *Mortality from Abortion and Childbirth: Are the Populations Comparable?*, 248 J. Am. Medical Assoc. 188, 191 (1982); Cates, Smith, Rochat & Grimes, *Mortality from Abortion and Childbirth: Are the Statistics Biased?*, 248 J. Am. Medical. Assoc. 192, 195-96 (1982).

16 Contrary to the information about abortion provided by some AFL grantees, JA 350, 425, 589, researchers have demonstrated that abortions cause no negative effects on subsequent pregnancies in the United States. Chung, Smith, Steinhoff and Mi, *Induced Abortion and Spontaneous Fetal Loss in Subsequent Pregnancies*, 72 Am. J. Public Health, 548, 551 (1982), or worldwide, *see* Hogue, Cates and Tietze, *The Effects of Induced Abortion on Subsequent Reproduction*, 4 Epidemiological Reviews 66, 88-89 (1982); *see also* Tietze & Henshaw, *Induced Abortions: A World Review 1986* at 97-105 (6th ed. 1986) (examining complications and sequelae from induced abortions).

17 National Research Council, *Risking the Future: Adolescent Sexuality, Pregnancy, and Childbearing, Vol. I* 123-25 (1987).

girls experience 2½ times greater risk of death from continued pregnancy or childbirth than adult women, and also much higher rates of major health complications.[18] For example, women younger than age fifteen are 15% more likely to suffer from toxemia, 92% more likely to develop anemia, and 23% more likely to suffer complications from a premature delivery than are women aged twenty to twenty-four.[19]

In addition to the physiological risks childbirth may entail, carrying a child to term and then giving it up for adoption can be psychologically damaging for the mother. Four principal studies of women who have surrendered their infants for adoption uniformly conclude that women who relinquish their children for adoption are exposed to serious social and psychological harm.[20] Among the problems noted by these research studies are social rejection and ostracism, obsessive fear of future infertility, varying degrees of sexual dysfunction and marital problems.

In contrast, abortion has far fewer negative psychological consequences. Studies show that one of the most frequent emotional responses to the abortion procedure is relief.[21]

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18 *See* Alan Guttmacher Institute, *Teenage Pregnancy: The Problem That Hasn't Gone Away* 29 (1981) [hereinafter *Teenage Pregnancy*]; Cates, Schultz & Grimes, *The Risks Associated With Teenage Abortion*, 309 New Eng. J. Medicine 621, 622 (1983).

19 *Teenage Pregnancy* at 29.

20 *See* Burnell and Norfleet, *Women Who Placed Their Infant for Adoption: A Pilot Study*, 1 Patient Counseling Health Education 169 (1979); Rynearso, *Relinquishment and Its Maternal Complications: A Preliminary Study*, 139 Am. J. Psychiatry 338 (1982); Deykin, Campbell and Patti, *The Post-Adoption Experience of Surrendering Parents*, 54 Am. J. Orthopsychiatry 271 (1984); Winkler & Van Keppel, *Relinquishing Mothers in Adoption*, 3 Institute of Family Studies Monograph 1-2 (1984).

21 *See* Freeman, *Influence of Personality Attributes on Abortion Experiences*, 47 Am. J. Orthopsychiatry 503, 504 (1977); National Research Council, *Risking the Future: Adolescent Sexuality, Pregnancy, and Childbearing* at 195; Adler & Dolcini, *Psychological Issues and Abortion for Adolescents*, in Adolescent Abortion: Psychological & Legal Issues 84 (Melton, ed. 1986) (Report of the Interdivisional Committee on Adolescent Abortion, American Psychological Association) [hereinafter *APA Report*].

Severe psychological after-effects rarely occur, and other sequelae, such as regret, depression or guilt, "are mild and diminish rapidly over time and general functioning is not adversely affected," Adler and Dolcini, *APA Report* at 84. In addition, adverse psychological after-effects such as depression are more common for childbirth than for abortion.[22]

The children of teenage mothers are also adversely affected. They are twice as likely to die in infancy as the children of women in their twenties and they are more likely to be premature or of low birth weight.[23] Low birth weight is itself a major cause of infant mortality, serious illness, birth injury, mental retardation, and other neurological defects.[24] The children of teenage mothers also suffer educational disadvantage, tend to have lower IQ and achievement scores, and are more likely to repeat at least one grade.[25]

In addition, studies show that children born to teenage mothers who have been denied permission to abort manifest

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22 *See* Cates, *Adolescent Abortions in the United States*, 1 Journal Adolescent Health Care 18, 22 (1980); Maracek, *Consequences of Adolescent Childbearing and Abortion*, in *APA Report* at 110-12 (showing that severe emotional consequences rarely, if ever, occur after abortion and that there is evidence that suggests positive changes occur in some cases); Koenig & Zelnik, *Repeat Pregnancies Among Metropolitan-Area Teenagers: 1971-1979*, 14 Family Planning Perspectives 341 (1982) (Unmarried teenagers whose first pregnancy ended in abortion were only half as likely to become pregnant a second time within 24 months as those unmarried teenagers whose first pregnancy resulted in a live birth).

23 *See Teenage Pregnancy* at 29. Pregnant adolescents are less likely to receive prenatal care than older women. Even when they receive care, however, their infants are at increased risk of adverse outcomes. Leppert, Namerow & Barker, *Pregnancy Outcomes Among Adolescent and Older Women Receiving Comprehensive Prenatal Care*, 7 J. Adolescent Health Care 112 (1986).

24 *See Substantially Higher Morbidity and Mortality Rates Found Among Infants Born to Adolescent Mothers*, 16 Family Planning Perspective, 91-92 (1984).

25 *See* Baldwin and Cane, *The Children of Teenage Parents*, 12 Family Planning Perspectives 34, 37 (1980).

particular problems in adjustment, mental and physical capacity, and in the mother-child relationship.[26]

Nor can the government justify the AFLA's prohibition on abortion counseling on the grounds that it promotes the social welfare of minors. It is widely recognized that an ill-informed decision on childbirth may have drastic adverse economic and social consequences for pregnant teenagers, particularly those low-income youths who are targeted by the Act. The Findings of the AFLA itself take note of the adverse effects of childbirth for teenagers. 42 U.S.C. § 300z(a)(5). For example, mothers who give birth before age eighteen are only half as likely to graduate from high school as those who postpone childbearing until after age twenty and they are four to five times less likely to finish college.[27] Families headed by teenage mothers are seven times more likely than others to be poor, and the younger the mother, the lower the family income.[28]

The distorted counseling mandated by the Act is particularly harmful for low-income teenagers and their parents because they are least likely to be fully informed of the options available to pregnant teenagers and to have access to alternative, unbiased, comprehensive health-care programs. Given the

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26 David and Matejcek, *Children Born to Women Denied Abortion: An Update*, 13 Family Planning Perspectives, 32, 33 (1981); Caplan, *The Disturbance of the Mother-Child Relationship by Unsuccessful Attempts at Abortion*, 38 Mental Hygiene 67, 77 (1954); Hook, *Refused Abortion: A Follow-up Study of 249 Women Whose Applications Were Refused by the National Board of Health in Sweden*, 42 Acta Psychiatrica Scandinavica 71-88 (1966).

27 *See* Card & Wise, *Teenage Mothers and Teenage Fathers: The Impact of Early Childbearing on the Parents' Personal and Professional Lives*, 10 Family Planning Perspectives 199, 203-04 (1978); *see also* Moore & Waite, *Early Childbearing and Educational Attainment*, 9 Family Planning Perspectives, 220, 222-23 (1977); Mott & Marsiglio, *Early Childbearing and Completion of High School* 17 Family Planning Perspectives 234, 235-36 (1985).

28 *See Teenage Pregnancy* at 33. Marecek, *APA Report* at 98-108 (long term effects of carrying to term can include negative impact on educational and occupational attainment, economic status, marital experiences, and subsequent childbearing).

plethora of harms associated with compelling a teenager to carry a pregnancy to term, the government can assert no interest that justifies its invasion of an adolescent's right to decide whether or not to terminate her pregnancy.

II. THE AFLA DISCRIMINATES AMONG RELIGIONS BY REQUIRING THE INVOLVEMENT OF RELIGIOUS ORGANIZATIONS THAT DO NOT ADVOCATE, PROMOTE OR ENCOURAGE ABORTION.

A. Because the AFLA Favors Certain Denominations It Must Be Subject to Strict Scrutiny.

Religious denominations in the United States are sharply divided over the question of abortion. JA 601-605. The Roman Catholic Church teaches that personhood begins at the moment of conception and, therefore, from its perspective, abortion is murder. JA 591. Judaism and most mainline Protestant groups reject the notion of fetus as person on religious grounds. JA 592. Under Jewish law, for example, abortion is an option that may be religiously compelled where the mental or physical health of the pregnant woman is threatened. JA 600. Other religious denominations teach that the requisite moral choices involve consideration of factual information about the consequences of alternative courses of action to oneself, one's family, and society. Accordingly, many Protestant denominations, such as the Methodists, hold that the abortion decision must be a matter of conscience for the woman, requiring consideration of available options. JA 602, 606. Other denominations, such as the General Assembly of the Presbyterian Church, support the availability of abortion. The Southern Baptist Convention has officially sanctioned teaching materials discussing abortion. JA 597.

This plurality of religious views on the morality of abortion is protected by the First Amendment's provisions regarding the establishment and free exercise of religion. Nevertheless, Congress has attempted to establish some religions in passing a statute that mandates the involvement of religious organizations in the presentation of information on adolescent sexuality and pregnancy and simultaneously prohibits presentation of information about abortion. Under the AFLA an abortion "test" is applied to religious applicants and also to religious organizations that are involved in the projects administered by other organizations. Only religious organizations which do not "advocate, promote or encourage" abortion may be funded under the AFLA or involved in programs administered by other grantees.

The inevitable consequence of the conjunction of the abortion prohibition with the involvement of religious organizations is the favoring of some religions over others. Numerous religions are subject to impermissible discrimination. For example, Southern Baptist Churches providing sex education with the officially sanctioned text of the Southern Baptist Convention, *Growing Up With Sex*, are ineligible for AFLA funding because the book presents information on pregnancy options, including abortion. Even though *Growing Up With Sex* advocates premarital sexual abstinence, provides factual information on sexual maturation, and supports the development of responsible sexual attitudes, its provision of abortion information disqualifies Southern Baptist Churches using it from AFLA funding. JA 597.[29]

In contrast, groups with anti-abortion religious beliefs are benefitted by the AFLA. Family of the Americas Foundation (FAF), for example, received $1,239,250 to provide prevention programs. JA 791. These programs relied on unsound contraceptive methods, taught that abortion was the "premeditated killing of an unborn baby in the mother's womb," and pre-

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29 Other religious leaders perceive their denominational beliefs denigrated by the government's exclusive funding of religious organizations that hold religious views on the issue of abortion antithetical to their denomination's views. See testimony of Reverend Vaughan, Methodist minister of Beverly Hills Church, JA 54; Reverend Buxton, Minister of Floris Methodist Church, JA 56; Rabbi Luxenburg, member and representative for the American Jewish Congress, JA 58-61.

sented only negative and biased information about abortion. JA 587.[30]

Similarly, St. Margaret's Hospital, a Catholic hospital run by the Archdiocese of Boston, received $1,879,118 for Combination Care and Prevention projects. At St. Margaret's adolescents were taught biased and misleading information on family planning and abortion designed to discourage the use of contraceptives and abortion in accordance with Catholic doctrine and in opposition to the health needs of its adolescent patients. JA 525-539.

When the Court is presented with an establishment clause challenge to a law "granting a denominational preference, our precedents demand that we treat the law as suspect and that we apply strict scrutiny in adjudging its constitutionality." *Larson v. Valente*, 456 U.S. 228, 246 (1982).[31] Strict scrutiny applies

30 FAF describes itself as "a Christian Alternative" and its Executive Director reports regularly to the head of the Catholic Church. JA 381, 581, 627, 629. It teaches the ineffective Billings Ovulation method of family planning to those who are striving "to make themselves better instruments of God's plan." FAF encourages the Billings method because "it helps realize that the family is an integral part of the church." JA 379, 385. The Billings method relies on self-detection of changes in cervical mucus throughout the menstrual cycle, permitting abstinence during fertile periods. The Billings method has a high failure rate of approximately 24% for all users. Alan Guttmacher Institute, *Making Choices* at 8, 28. It is particularly unsuited for adolescents and the many women who have irregular or anovulatory periods. *Id.* at 8. FAF also taught adolescents that condoms are "a pollution of their own bodies," JA 381, and that they were "messy, unnatural," caused "irritations," and were "never" recommended. JA 396. Consequently, FAF education blunts, for religious reasons, the impact of the Attorney General's recommendation that use of condoms can provide protection from AIDS. *Surgeon General's Report on Acquired Immune Deficiency Syndrome* 17 (1987). These are examples of how AFLA promotion of religious dogma on abortion has led to government support of religiously-motivated misinformation on family planning and sexually transmitted disease prophylaxis.

31 Statutes, to be upheld under the establishment clause, must in addition to not discriminating among religions, pass the three-part test developed in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). Under *Lemon*, a government action survives establishment clause scrutiny only if it (1) has a secular purpose, (2) has a primary effect that neither advances nor inhibits

whether or not discrimination appears on the face of the statute. *Gillette v. United States*, 401 U.S. 437, 452 (1971).[32] In *Larson v. Valente*, for example, the Court subjected to strict scrutiny a Minnesota statute that required reports only from religious organizations that received most of their contributions from nonmembers even though the statute did not express a denominational preference on its face. Like the statute found unconstitutional in *Larson*, the AFLA makes "explicit and deliberate distinctions between different religious organizations." 456 U.S. at 247 n.23. It effectively distinguishes between denominations which espouse an absolute prohibition on abortion as a part of their religious dogma on the one hand and denominations which espouse a broader view of moral options available to pregnant adolescents on the other hand.

B. The AFLA Is Not Narrowly Tailored to Further a Compelling Government Interest.

Even if government interests in preventing the adverse health, social, and economic consequences of adolescent pregnancy and childbirth were sufficiently compelling to justify discrimination among religions, the AFLA does not in any way promote those interests. The inclusion of religious denominations that do not advocate, promote or encourage abortion

religion, and (3) does not foster excessive government entanglement with religion. As appellees argue, and as the District Court found below, the AFLA also fails the effect and entanglement aspects of the *Lemon* test.

32 The AFLA cannot escape strict scrutiny under *Gillette* because it applies to organizations and not to individuals. *Gillette* involved an Establishment Clause challenge to a statute that accorded conscientious objector status to individuals who, like Quakers, conscientiously oppose all wars but not to individuals who, like Catholics, oppose only unjust wars. There the statute applied equally to individuals, and did not treat religions or religious organizations differently. In contrast, the AFLA explicitly requires applicants to involve *religious organizations*. Accordingly, the government must distinguish between the moral principles and theological positions of various sectarian organizations.

simply does not further the interests that the AFLA purportedly serves.

For the reasons documented in Point I, *supra*, the AFLA's prohibition on abortion counseling and referral has a devastating effect on the health and well-being of the vulnerable and underserved adolescents targeted by the Act. Denial of the constitutional right to make informed reproductive decisions with a concomitant rise in the risk of adolescent morbidity and mortality is a consequence of the Act. Furthermore, adolescents may be likely to reject the health information proferred.

One of the dangers of government endorsement or disapproval of religion is the creation of an outsider class:

> Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community. Disapproval sends the opposite message.

Lynch v. Donnelly, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring). *See also Wallace v. Jaffree*, 472 U.S. 38, 69 (1985) (O'Connor, J., concurring). To the extent that government support of religious organizations that are opposed to abortion discourages other charitable groups and nonreligious adolescents from participating in reproductive health and education programs, the AFLA is counterproductive. By making certain religious organizations and adolescents feel like outsiders, the AFLA has increased the chance that opportunities to participate in valuable health programs will be rejected.

Public health research on the effectiveness of various approaches to the problems of adolescent pregnancy has not demonstrated benefit to programs administered by religious organizations or involving religions that have strictures against abortion and contraception. Given the overwhelming problems of teenage pregnancy, a statute that discriminates against religious organizations who offer unbiased information on reproductive options is not closely tailored to further any compelling government interest and must be invalidated.

III. THE AFLA'S RESTRICTION ON ADVOCATING, PROMOTING OR ENCOURAGING ABORTION DISCRIMINATES ON THE BASIS OF VIEWPOINT IN VIOLATION OF THE FIRST AMENDMENT.

Once the government has opened a forum for discussion, it must maintain viewpoint neutrality and ensure that the forum be nondiscriminatory. *Cornelius v. NAACP Legal Defense and Education Fund*, 473 U.S. 788 (1985).[33] In *Cornelius*, the Court upheld an Executive Order banning access by legal defense and political advocacy organizations to a non-public forum only because the ban was viewpoint neutral. The Court noted, however, that even a facially neutral regulation would fall if it were "in reality a facade for viewpoint-based discrimination." 473 U.S. at 811. Thus, if a facially neutral regulation can be unconstitutional, the explicitly discriminatory prohibition on abortion information in the Act is clearly unconstitutional.

Moreover, principles of viewpoint neutrality dictate that public funds may not be allocated so as to suppress "dangerous" ideas while subsidizing "approved" ideas. *FCC v. League of Women Voters*, 468 U.S. 364 (1984). There, the Court struck down a ban on editorializing by publicly-funded radio stations

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33 It is irrelevant that the forum here is not the traditional one of public streets, sidewalks and parks. This Court has held in *Cornelius* that:

> In addition to traditional public fora, a public forum may be created by government designation of a place or channel of communication for the use by the public at large for assembly and speech, for use by certain speakers, *or for the discussion of certain subjects*.

473 U.S. at 802 (emphasis added). Here the government has expressly created a public forum encouraging public communication, especially between parents and adolescents, and among the schools, youth agencies, charitable organizations, and health providers who serve them. An announced purpose of the AFLA is to:

> "encourage and provide for the dissemination of results, findings, and information from programs and research projects relating to adolescent premarital sexual relations, pregnancy, and parenthood."

42 U.S.C. § 300z(b)(6). Consequently the government has opened a channel for public communication under the AFLA.

on First Amendment grounds because the ban was "motivated by nothing more than a desire to curtail expression of a particular point of view on controversial issues of general interest." *Id.* at 383-84, *quoting Consolidated Edison Co. v. Public Service Commission of New York*, 447 U.S. 530, 546 (1980) (Stevens, J., concurring). *See also Regan v. Taxation With Representation*, 461 U.S. 540, 548 (1983) (restriction prohibiting receipt of tax-deductible contributions by non-profit lobbying organizations upheld only because of its viewpoint neutrality); *Arkansas Writers' Project, Inc. v. Rugland*, ____ U.S. ____, 107 S. Ct. 1722 (1987) (public regulation of publications on the basis of their content violates the First Amendment).[34]

Here, the AFLA requires the Secretary of Health and Human Services to ascertain whether programs conform with the limitation on providing abortion information and to withhold their funds if they do not. 42 U.S.C. § 300z-10(b). By such punitive measures the statute compels what the First Amendment forbids by granting government the power to restrict expression "because of its subject matter, or its content." *Police Department v. Mosley*, 408 U.S. 92, 95 (1972).

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34 More than a decade ago the Supreme Court held that a statute prohibiting anyone to "encourage or prompt the procuring of abortion . . ." violated the First Amendment, even as applied to commercial advertising. *Bigelow v. Virginia*, 421 U.S. 809 (1975). Later, counseling about abortion was held to be constitutionally protected speech. *See, e.g., Planned Parenthood Association v. Kempiners*, 568 F. Supp. 1490, 1495 (N.D. Ill. 1983). *Planned Parenthood v. Arizona*, 718 F.2d 938 (9th Cir. 1983), *appeal after remand*, 789 F.2d 1348 (9th Cir.), *aff'd without opinion sub nom., Planned Parenthood v. Babbitt*, 107 S. Ct. 391 (1986), is inapposite in a First Amendment context. There the court, relying on *Maher v. Roe*, 432 U.S. 464 (1977), which had been decided on Fourteenth Amendment equal protection grounds, permitted Arizona to refuse to *fund* abortion-related activities by non-governmental organizations. *Maher* has no application in the First Amendment area, 432 U.S. at 475 n.8. Here the government has forbidden grantees to freely express their views on abortion, even if grantees use their own funds to do so. JA 93. Thus the government has impermissibly conditioned the receipt of a government benefit on the sacrifice of the constitutional right to free expression. *Sherbert v. Verner*, 374 U.S. 398 (1963).

The government need not remove those obstacles not of its own creation in the way of a person's right to free speech. However, having opened a channel for speech about adolescent sexuality and pregnancy, it may not block the dissemination of medical information about abortion. *See Regan v. Taxation With Representation*, 461 U.S. at 549-50. No compelling government interest can be offered in support of a prohibition that distorts the medical information available to adolescents to the detriment of their health and well-being.

Conclusion

Amici urge that the District Court's judgment be affirmed as to its finding that the AFLA is unconstitutional insofar as it involves religious organizations and reversed as to its upholding the constitutionality of the Act as it applies to all other applicants and grantees.

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Respectfully submitted,

Of Counsel:

NADINE TAUB
Rutgers University School
of Law
15 Washington Street
Newark, New Jersey 07102

JUDITH LEVIN
Rabinowitz, Boudin,
Standard, Krinsky
& Lieberman
740 Broadway
New York, New York 10003

JOHN H. HALL
(Counsel of Record)
MARY SUE HENIFIN
DEBEVOISE & PLIMPTON
875 Third Avenue
New York, New York 10022
(212) 909-6000

Attorneys for Amici Curiae
American Public Health Association, American Psychological Association, Planned Parenthood Federation of America, Inc., and National Family Planning & Reproductive Health Association

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, APPELLANT

v.

CHAN KENDRICK, ET AL.

(and three consolidated cases)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF *AMICUS CURIAE* OF THE NATIONAL COALITION FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY (NATIONAL PEARL)[1] PEOPLE FOR THE AMERICAN WAY ADVOCATES FOR CHILDREN OF NEW YORK, INC. ASSOCIATION FOR SUPERVISION AND CURRICULUM DEVELOPMENT NATIONAL ASSOCIATION OF ELEMENTARY SCHOOL PRINCIPALS NATIONAL CONGRESS OF PARENTS AND TEACHERS SEX INFORMATION AND EDUCATION COUNCIL OF THE U.S. SOCIETY FOR THE SCIENTIFIC STUDY OF SEX VERN L. BULLOUGH SUPPORTING APPELLEES

HERMAN SCHWARTZ
AMERICAN UNIVERSITY
SCHOOL OF LAW
4400 Massachusetts Ave., N.W.
Washington, D.C. 20016
(202) 885-2648

DAVID B. ISBELL
DAVID H. REMES *
RICHARD H. SEAMON
COVINGTON & BURLING
1201 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 662-5212

Counsel for Amici Curiae

* *Counsel of Record*

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[1] *Members of National PEARL separately joining in this Brief are listed on the inside front cover*

Members of National PEARL Separately Joining in this Brief:

American Ethical Union

American Humanist Association

Americans for Religious Liberty

Board of Church and Society of the United Methodist Church

Central Conference of American Rabbis

Committee for Public Education and Religious Liberty

Council for Democratic and Secular Humanism

MC PEARL—Monroe County, New York PEARL

Michigan Council About Parochiaid

Missouri Baptist Christian Life Commission

Missouri PEARL

Nassau-Suffolk PEARL

National Association of Catholic Laity

National Council of Jewish Women

National Education Association

National Service Conference of the American Ethical Union

New York State United Teachers

Ohio Association for Public Education and Religious Liberty

People for the American Way

Public Funds for Public Schools of New Jersey

Union of American Hebrew Congregations

Unitarian Universalist Association

QUESTION PRESENTED

Does the Establishment Clause permit the Government to pay religious organizations to promote government policies that such organizations teach as articles of religious faith?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

Nos. 87-253, 87-431, 87-462 & 87-775

OTIS R. BOWEN, SECRETARY OF HEALTH
AND HUMAN SERVICES, APPELLANT

v.

CHAN KENDRICK, ET AL.

(and three consolidated cases)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF *AMICUS CURIAE* OF THE NATIONAL COALITION FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY (NATIONAL PEARL) PEOPLE FOR THE AMERICAN WAY ADVOCATES FOR CHILDREN OF NEW YORK, INC. ASSOCIATION FOR SUPERVISION AND CURRICULUM DEVELOPMENT NATIONAL ASSOCIATION OF ELEMENTARY SCHOOL PRINCIPALS NATIONAL CONGRESS OF PARENTS AND TEACHERS SEX INFORMATION AND EDUCATION COUNCIL OF THE U.S. SOCIETY FOR THE SCIENTIFIC STUDY OF SEX VERN L. BULLOUGH SUPPORTING APPELLEES

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const., Amend. I:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."

Section 2006 of the Adolescent Family Life Act (AFLA), 42 U.S.C. § 300z-5(a):

> "An application for a grant for a demonstration project for services under this subchapter . . . shall include—
>
> . . . .
>
> (21) a description of how the applicant will, as appropriate in the provision of services—
>
> . . . .
>
> (B) involve religious and charitable organizations, voluntary associations, and other groups in the private sector . . . ."

INTEREST OF *AMICI CURIAE*

The National Coalition for Public Education and Religious Liberty (National PEARL) is a national coalition of organizations sharing the common objectives of preserving freedom and the separation of church and state in public education. National PEARL includes, among other organizations, the Committee for Public Education and Religious Liberty, which joins this Brief on behalf of its member organizations, some of which are also members of National PEARL.[1]

[1] The members of the Committee for Public Education and Religious Liberty include: American Ethical Union; N.Y. Americans for Democratic Action; Americans for Religious Liberty; Aspira; Association of Reform Rabbis of New York City and Vicinity; B'nai B'rith; Community Church of New York; Council of Churches of the City of New York; Council of Supervisors and Administrators; Episcopal Diocese of Long Island, Committee on Social Concerns and Peace; Humanist Society of Greater New York; Jewish War Veterans, New York Department; National Service Conference of The American Ethical Union; New York Federation of Reform Synagogues; New York Jewish Labor Committee; New York Conference of the Society for Ethical Culture; New York Society for Ethical Culture; New York State Congress of Parents and Teachers; Public Education Association; Union of American Hebrew Congregations, New York State Council; United Americans for Public Schools; United Community Centers; United Federation of Teachers; United Parents Associations; United Synagogue of America, New York Metropolitan Region; Women's City Club of New York; Workmen's Circle, New York Division; Monroe Citizens for Public Education and Religious Liberty; and New York State United Teachers.

People For the American Way is a non-partisan citizen's organization established to promote and protect civil and constitutional rights. People For the American Way was founded in 1980 by a group of religious, civic, and education leaders devoted to our heritage of tolerance and pluralism; it now has 270,000 members nationwide. The organization's primary mission is to educate the public on the importance of our democratic tradition and to defend that tradition against attacks by those who would impose sectarian constraints on a free society.

Advocates for Children of New York, Inc. (AFC) is a 17-year-old voluntary, non-profit children's rights organization. AFC's activities have focused on securing and defending the educational rights of New York City public school students through representation in the courts and the legislature, and through public advocacy activities. AFC joins this Brief because of its interest in promoting full discussion of information and ideas in educational settings.

The Association for Supervision and Curriculum Development is a 76,000-member association of principals, teachers, central office administrators, and professors who care deeply about assuring a quality education for all students. As practicing educators, the Association's members and their students are directly and adversely affected by decisions that limit access to complete and accurate information.

Vern L. Bullough is Dean of Natural and Social Sciences of the State University of New York at Buffalo. He has extensively researched and written on church-state conflicts over human sexuality. He joins this Brief out of concern that the challenged statute improperly permits religiously inspired restrictions on the complete and objective information on sexuality that should be available to adolescents.

The National Association of Elementary School Principals is a professional organization of more than 23,000 elementary and middle school administrators. Its members are responsible for the education of approximately 25 million elementary school students throughout the country.

The National Congress of Parents and Teachers (National PTA) is a nationwide organization with a current membership of over 5.8 million parents, teachers, and concerned citizens. The primary purpose of the National PTA is to promote the welfare of children at home, in school, and in the community.

The Sex Information and Education Council of the U.S. (SIECUS) is a private, non-profit, educational organization established to promote healthy sexuality as an integral part of human life. It believes that accurate information, comprehensive education, and positive attitudes toward sexuality enhance individual physical and mental health and promote communication and caring within our society. SIECUS provides information and education on sexual matters through a clearinghouse and resource center.

The Society for the Scientific Study of Sex is an international organization dedicated to the advancement of knowledge about sexuality. The Society brings together an interdisciplinary group of professionals who believe in the importance of both the production of quality research and clinical, educational, and social applications of research related to all aspects of sexuality.

INTRODUCTION

At issue in this case is the constitutionality of the Adolescent Family Life Act (AFLA), a federal statute that provides public funds to religious organizations, among other groups, for care, education, and counseling services aimed at preventing adolescent premarital sexual relations and pregnancy. Plaintiffs—federal taxpayers, clergy members, and the American Jewish Congress—filed suit in the U.S. District Court for the District of Columbia, alleging that AFLA on its face and as applied violated the Establishment Clause. The District Court held AFLA unconstitutional insofar as it involved religious organizations in the provision of services. The District Court subsequently held that the statute's references to religious organizations were severable from the rest of the statute. The case is before this Court on appeals by the Government and intervenor-defendant United Families of America from the District Court's ruling that AFLA violates the Establishment Clause, and on plaintiffs' cross-appeal from the ruling on severability.

STATEMENT OF THE CASE

1. Congress enacted AFLA, 42 U.S.C. §§ 300z to 300z-10 (1982), to replace the Health Services and Centers Amendments of 1978 (Title VI).[2] AFLA's sponsors, Senators Jeremiah Denton and Orrin Hatch, maintained that Title VI was inadequate to combat adolescent premarital sex and pregnancy. They asserted that Title VI did not sufficiently involve private entities, including religious organizations, in the provision of services and that it did not adequately emphasize the value of abstinence from premarital sex, or promote adoption as an alternative to abortion.[3]

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[2] Pub. L. No. 95-626, tit. VI, 92 Stat. 3595 (repealed October 1, 1981).

[3] *See* S. Rep. No. 161, 97th Cong., 1st Sess. 4 (1981); 127 Cong. Rec. 8266 (1981) (remarks of Sen. Hatch); Letter to President Reagan from Sens. Hatch, Denton, East, and Nickles (Aug. 1981)

AFLA met these perceived deficiencies in Title VI. First—and central to this case—AFLA included a requirement that applicants for funds describe how they would,

> "as appropriate in the provision of services . . . involve religious and charitable organizations, voluntary associations, and other groups in the private sector . . . ."

42 U.S.C. § 300z-5(a)(21). Second, AFLA authorized grants not only to provide care services for pregnant adolescents, but also to provide services necessary to prevent adolescent pregnancy. *Id.* § 300z-1(a)(8). These "prevention services" were to emphasize sexual abstinence rather than contraception as the means to prevent pregnancy. *See id.* § 300z-1 (a)(4)(G); *id.* § 300z-3(b). Finally, AFLA barred grantees from using AFLA funds to promote or encourage abortion or to provide abortion referrals—unless requested by both the adolescent and his or her parents. *Id.* § 300z-10. Grantees were directed to encourage adoption in lieu of abortion. *Id.* § 300z-1 (a)(4)(B); *see also id.* § 300z(b)(2).

2. Plaintiffs challenged AFLA not only on its face but also as applied. Evidence concerning AFLA's application centered on the Office of Adolescent Pregnancy Program (OAPP), the agency within the U.S. Department of Health and Human Services (HHS) responsible for administering AFLA.

The Director of OAPP selected 72 "external field readers" to review and rank applications. Joint Appendix ("J.A.") at 95. Twenty-nine of these readers either were employed by religious organizations or had close ties with such organizations.[4] Many readers indicated by

(attached as Exhibit A to Plaintiffs' Memorandum in Response to District Court's Order of April 15, 1987 In Opposition to Severance).

[4] R. 155, Vol. 1, at 29-34; *see also* J.A. at 98.

written comments on application scoring sheets that they favored programs contemplating an overtly religious approach to counseling adolescents, and disfavored proposals *lacking* a religious (or an affirmatively anti-abortion) approach. For example, one reader criticized an application as follows: "There is missing a decided pro-life commitment in this proposal . . . . Lacking is the kind of counseling that you get in Catholic Social Service, for example." J.A. at 509. Another reader criticized a proposal for containing "[n]o experts on transcendental (the most effective) Judeo-Christian values." J.A. at 511.

The record further established that awards were approved for programs that employed explicitly religious curricula. For example, one grantee, St. Ann's Infant and Maternity Home, made available to program participants a book that discusses contraception and abortion in these terms:

> "For the believer, contraception represents the mentality of those who under pressure of their own sexual desires, or the sexual desires of partners they would rather please than lose, have blocked out the demands of faith in God, who gave man the intelligence and willpower to control his sexuality and regulate his family naturally, lovingly. For the unbeliever, contraception represents the mentality of those who have lost faith in man's ability or willingness to control himself, to love.
>
> . . . .
>
> No one has a right to have sex when there is no mutual intention to cherish, safeguard, protect and provide for the life that may be conceived. Abortion merely compounds the evil by adding the willful termination of an innocent life to irresponsible sexual intercourse."

J. McGoey, *Sex, Love and the Believing Girl* (J.A. at 336, 357, 360-61).

Religious views on sexuality also were presented in other AFLA-funded programs.[5] Some AFLA programs conducted by religious grantees took place in conjunction with programs of religious instruction.[6] The Government acknowledges that some AFLA programs included religious instruction and that other "departures from proper constitutional principles" took place. U.S. Brief at 40.

Grantees and subgrantees included at least ten religious organizations that submitted statements of purpose or articles of incorporation dedicating them to promoting the tenets of their religion.[7] While some of these organizations' AFLA-funded programs were conducted in such secular settings as public schools,[8] others were conducted on religious sites adorned with religious symbols, including parochial schools, churches, and parish halls.[9] They were often publicized to, and conducted for the exclusive benefit of, members of a single denomination.[10]

Until 1984, OAPP made almost no attempt to discourage the use of AFLA funds by sectarian organizations to teach religion. After this lawsuit was filed in late

[5] *See, e.g.*, J.A. at 269-76 (Catholic Charities of Arlington); J.A. at 410-30 (St. Margaret's Hospital); J.A. at 559-60 (Catholic Family Service of Amarillo).

[6] *See, e.g.*, J.A. at 172-74, 206-09, 225-26, 253-54 (Catholic Charities of Arlington); J.A. at 568 (Northwest Regional Health Center).

[7] *See, e.g.*, J.A. at 155 (Catholic Family Service of Amarillo); J.A. at 376 (St. Ann's); J.A. at 385-90 (Families of America Foundation); J.A. at 572 (Cities in Schools); J.A. at 515-16 (St. Margaret's Hospital); J.A. at 562 (SEMO); *see also* J.A. at 608 (Boston Archdiocese).

[8] *See, e.g.*, J.A. at 401-29 (St. Margaret's Hospital).

[9] *See, e.g.*, J.A. at 153 (Catholic Family Service of Amarillo); J.A. at 170, 211 (Catholic Charities of Arlington); J.A. at 456 (CASI); J.A. at 401-29 (St. Margaret's Hospital); J.A. at 485 (Lyon County).

[10] *See, e.g.*, J.A. at 264 (Catholic Charities of Arlington); J.A. at 465 (St. Margaret's Hospital).

1983, OAPP wrote letters to three grantees advising them not to use AFLA funds for religious instruction and terminated one grantee for such uses. *See* J.A. at 671-76, 742-43. In 1984, HHS added to its Notice of Grant Award form a provision advising grantees not to use AFLA funds for religious purposes. J.A. at 514, 757-68. The government did not advise AFLA-funded religious organizations how they might disentangle their religious views from the public policies they were being paid to promote.

3. Plaintiffs filed suit in October 1983. They sought to enjoin funding under AFLA and to obtain a declaration that on its face and as applied AFLA violated the Establishment Clause.

Applying the three-part analysis of *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971), the District Court held AFLA invalid "insofar as religious organizations are involved in carrying out the programs and purposes of the Act." *Kendrick v. Bowen*, 657 F. Supp. 1547, 1570 (D.D.C. 1987). The court concluded that the statute had a valid secular purpose. *Id.* at 1558-60. But the court ruled that on its face and as applied AFLA had the primary effect of advancing religion. *Id.* at 1562-67. The court also determined that AFLA fostered excessive entanglement between the government and religion. *Id.* at 1567-69.

SUMMARY OF ARGUMENT

AFLA impermissibly directs that public funds be awarded to religious organizations to promote government policies that these grantees teach as articles of religious faith. Such direct promotion of religious dogma by government—paying religious entities to propagate religious doctrine—violates the Establishment Clause.

AFLA does not even purport to prohibit grantees from using public funds to promote religious teachings. Such

a prohibition in any event would pose insurmountable entanglement problems. Government officials would be required to assure that counseling by religious entities in matters of ultimate religious concern remained wholly secular.

The Government's attack on the judgment below amounts to a formalistic critique of a District Court's analytical protocol. The Government does not ultimately expose any flaw in the substance of the court's conclusion, nor could it. The substance of that conclusion—that AFLA funds can be and have been used for religious instruction—is clearly supported by the terms of the statute and overwhelming record evidence.

ARGUMENT

I. AFLA IMPERMISSIBLY ADVANCES RELIGION

This Court observed in *Grand Rapids School District v. Ball*, 473 U.S. 373 (1985), that a law may impermissibly advance religion in three ways. *First*, a law may take a form that renders it readily susceptible to use for religious activities.[11] *Second*, a law may provide an "indirect subsidy" to religion when it funds activities that are closely related to the religious mission of "pervasively sectarian" recipients. *See id.* at 392-97, 394 n.12. *Third*, a law may afford a symbolic benefit to religion when it gives rise to an appearance of joint action by governmental and religious authorities. *Id.* at 389-92. *See also Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 125-26 (1982).

[11] In *Grand Rapids*, the Court struck down state aid for educational programs in parochial schools because, among other reasons, "teachers participating in the programs may become involved in intentionally or inadvertently inculcating particular religious tenets or beliefs." 473 U.S. at 385. *See also Tilton v. Richardson*, 403 U.S. 672, 682-84 (1971).

The District Court correctly found AFLA deficient in each of these respects.[12]

A. AFLA Permits Government Funds To Be Used To Teach Religion

Establishment Clause jurisprudence is characterized by "few absolutes," but it *does* absolutely prohibit government-financed "indoctrination into the beliefs of a particular religious faith." *Grand Rapids*, 473 U.S. at 385. Accordingly, this Court has consistently struck down aid to religious organizations that is susceptible to use for religious instruction.[13] It has concluded, in particular, that financial subsidies for education and counseling of youth are inherently susceptible of such uses.[14] No means,

[12] Although the Court need not address the issue of AFLA's purpose to affirm the District Court's judgment, the *Amici* joining in this Brief believe that the District Court should have found that AFLA was enacted for the impermissible purpose of advancing religion, for the reasons set forth in the brief *amicus curiae* of the Committee for Public Education and Religious Liberty.

[13] *See, e.g., Grand Rapids*, 473 U.S. at 385-89; *Wolman v. Walter*, 433 U.S. 229, 248-55 (1977); *Meek v. Pittenger*, 421 U.S. 349, 362-72 (1975); *Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756, 774-94 (1973); *Sloan v. Lemon*, 413 U.S. 825, 828-31 (1973); *Levitt v. Committee for Public Education & Religious Liberty*, 413 U.S. 472, 479-82 (1973); *Tilton v. Richardson*, 403 U.S. 672, 682-84 (1971). *See also Committee for Public Education & Religious Liberty v. Regan*, 444 U.S. 646, 659 (1980) (upholding reimbursement to religious schools for costs of state-required testing while noting that "under the relevant cases the outcome would likely be different were there no effective means for insuring that the cash reimbursements would cover only secular services").

[14] *See, e.g., Wolman*, 433 U.S. at 250 (loan of instructional equipment and material to religious schools "*inevitably* flows in part in support of the religious role of the schools") (emphasis added); *Meek*, 421 U.S. at 366 (aid to educational function of religious schools "*necessarily* results in aid to the sectarian school enterprise as a whole") (emphasis added); *Nyquist*, 413 U.S. at 774 (finding it impossible to restrict state aid for maintenance and repair of

however carefully crafted, can provide the guarantee required by the Establishment Clause that aid in this form will be used *solely* for secular purposes. *See Meek*, 421 U.S. at 366; *Nyquist*, 413 U.S. at 779; *Lemon*, 403 U.S. at 617.

Under this case law, AFLA is invalid on its face. It is undisputed that, by mandating that applicants "involve" religious organizations in carrying out its program, AFLA contemplates that those organizations will receive federal funds. 42 U.S.C. § 300z-5(a)(21)(B); *Kendrick*, 657 F. Supp. at 1562. Furthermore, AFLA requires grantees to promote chastity and adoption as an alternative to abortion—without even purporting to assure that those policies will not be taught as, or confused with, religious precepts.

Religious grantees are bound to use AFLA aid to further religious teaching. Premarital sexual abstinence and abortion touch matters at the core of religious doctrine.[15] Moreover, they provoke "continuing debate" among religious denominations.[16] As the District Court noted, "[t]o presume that AFLA counselors from religious organizations can put their beliefs aside when counseling an adolescent on matters that are part of religious doctrine is simply unrealistic." 657 F. Supp. at 1563.

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religious schools to secular purposes); *Lemon*, 403 U.S. at 617; *cf. Levitt*, 413 U.S. at 480 ("no means are available" to ensure that funding for internally prepared tests at religious schools "are free of religious instruction").

[15] *See* J.A. at 590-602 (affidavits of experts in theology).

[16] *See Walz v. Tax Commission*, 397 U.S. 664, 695 (1970) (separate opinion of Harlan, J.) (recognizing that birth control and abortion laws are issues of "continuing debate" among religious denominations); *Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 99 (1980) (separate opinion of Powell, J.) (views favoring abortion would be "morally repugnant" to "church-operated enterprises").

The Government argues that "[o]utside the context of a pervasively sectarian institution, there is no authority in this Court's cases for presuming that religiously affiliated organizations will deliver otherwise secular services in a manner that makes them specifically religious." U.S. Brief at 38. This is incorrect. In *Tilton v. Richardson*, 403 U.S. 672 (1971), the Court applied just such a presumption in striking down a 20-year limit on the "secular purposes" restriction on federal construction grants to religious colleges and universities:

> "Limiting the prohibition for religious use of the structure[s] to 20 years obviously opens the facility to use for any purpose at the end of that period. . . . If, at the end of 20 years, the building is, for example, converted into a chapel or otherwise used to promote religious interests, the original federal grant will in part have the effect of advancing religion. To this extent the Act therefore trespasses on the Religion Clauses." *Id.* at 683.

The Court applied this presumption even though it determined that the religious colleges and universities receiving the grants were not "pervasively sectarian." *Id.* at 680-82. Aid to non-"pervasively sectarian" organizations may be permissible when the use of such aid is restricted to secular activities. However, when the use of such aid is not so restricted, it is proper to presume that the aid will be used to advance religion. *Cf. Roemer v. Maryland Public Works Board*, 426 U.S. 736, 746-48 (1976).

Moreover, the Government's assertion that it cannot be presumed that AFLA funds will be used to teach religion is sheer fantasy in the context of aid to promote values at the core of religious doctrine. Grants to promote these values surely present a greater potential for inculcation of religious views than does aid for "remedial arithmetic" or "medieval history." *Cf. Meek*, 421 U.S. at 371. And in fact these grants have been used to teach religion, as the Government admits (U.S. Brief at 40-41) and the District Court found (657 F. Supp. at 1567). The Gov-

ernment lamely attempts to dismiss the numerous instances of such religious uses as "not representative." U.S. Brief at 41. But this excuse presupposes a rule so indefensible that it cannot forthrightly be declared—that "minor encroachments" on the Establishment Clause need not trouble this Court. *See Abington School District v. Schempp*, 374 U.S. 203, 225 (1963).

Because AFLA by its terms allows religious grantees to use grants of public funds to teach religion, and because AFLA grants have been so used, the statute violates the Establishment Clause on its face and as applied.

B. AFLA Funds Sectarian Organizations To Promote Values at the Core of Their Religious Dogma and at the Center of Religious Debate

Aid to religious organizations that is not used for explicitly religious instruction nonetheless advances religion when it supports activities that "go[] hand in hand" with the religious mission of "pervasively sectarian" recipients. *See Grand Rapids*, 473 U.S. at 384.[17]

As the District Court found, AFLA supports activities that do not merely "go[] hand in hand" with the religious mission of religious grantees; they are an *integral part* of that mission. 657 F. Supp. at 1562-63. AFLA requires grantees to promote the values of premarital sexual abstinence over contraception and adoption over abortion. 42 U.S.C. §§ 300z(b)(2), 300z-1(a)(4)(B), (G), 300z-3(b), 300z-10. Certain denominations hold these values as fundamental religious tenets and are dedicated to promoting them as such. As to these grantees, the District Court concluded, the activities supported by AFLA and the organizations' religious mission were one and the same. 657 F. Supp. at 1562-63. Therefore, it is clear on the face of the statute that AFLA advances the religious mission of these religious grantees.

[17] *Accord Wolman*, 433 U.S. at 250; *Sloan v. Lemon*, 413 U.S. at 830-32; *Levitt*, 413 U.S. at 479-80; *see also Everson v. Board of Education*, 330 U.S. 1, 16 (1947).

The Government argues that AFLA cannot on its face be construed to advance the religious mission of grantees because it does not by its terms "require" that "pervasively sectarian" organizations be funded. U.S. Brief at 30. This argument is obviously wrong. The Court has often found facially invalid laws that did not expressly require support to "pervasively sectarian" organizations, if such organizations were in fact supported. In *Sloan v. Lemon*, 413 U.S. 825 (1973), for example, the Court struck down on its face a state law providing tuition reimbursements to parents who sent their children to "nonpublic" schools. *Id.* at 828. In an argument repeated here by the Government, the state maintained that, since the law did not *require* reimbursements be paid to religious schools, "no assumption [could] be made as to how individual parents [would] spend their reimbursed amounts." *Id.* at 831 (footnote omitted).[18] The Court, of course, rejected that argument.

The District Court in fact found that, as applied, AFLA funded a significant number of AFLA grantees that were "pervasively sectarian."[19] The record amply supports this finding. The AFLA programs of many religious grantees were directed by members of religious orders who were answerable to church officials. *See, e.g.*, J.A. at 297. The instructors were, in many cases, themselves members of religious orders, or otherwise subject to the control of religious authorities. *See, e.g.*, J.A. at 549-53. The AFLA programs of religious grantees were

[18] *See also Wolman*, 433 U.S. at 234-35, 248-51; *Nyquist*, 413 U.S. at 767-69; *Levitt*, 413 U.S. at 474-76, 480.

[19] *Kendrick*, 657 F. Supp. at 1564 ("AFLA has in fact . . . funded 'pervasively sectarian' institutions . . . ."); *id.* at 1566-67 ("[D]efendant has approved AFLA grants and distributed AFLA funds in a manner that advances religion, regardless of whether one looks for . . . a benefit to a 'pervasively sectarian' institution, or the use of tax dollars to 'teach' religion.").

often conducted on sites adorned with religious symbols, including parochial schools, *see, e.g.*, J.A. at 467, and, on a few occasions, in conjunction with programs of religious instruction, *see, e.g.*, J.A. at 568. A large proportion of the individuals attending some of these programs belonged to the denomination with which the grantee was affiliated. *See, e.g.*, J.A. at 211-12, 264. In short, numerous AFLA grantees had all of the attributes of institutions that traditionally have been found to be "pervasively sectarian" by this Court. *Cf. Wolman*, 433 U.S. at 234-35.

The District Court's examination of the record also confirmed that, as applied, AFLA funded organizations whose stated purpose was to promote religious doctrines proclaiming the impropriety of abortion and contraception. One AFLA grantee, for example, stated that its existence was inspired by the Encyclical *Humanae Vitae*. That is the document of the Roman Catholic Church that establishes the propriety of abstinence and the impropriety of abortion and contraception as fundamental tenets of church doctrine. 657 F. Supp. at 1565. The court determined that at least ten AFLA grantees or subgrantees were similarly dedicated to promoting religious doctrines that require abstinence and forbid abortion as matters of faith. *Id.* As applied, the court concluded, AFLA advanced the religious mission of these grantees.

In attacking the District Court's "as applied" analysis, the Government dismisses as irrelevant the link between the values that AFLA was enacted to promote and the religious doctrine that religious grantees are dedicated to promoting. U.S. Brief at 33, 36. This approach not only is grandly naive; it relies on cases involving action by *government* entities—not action by *religious* organizations.[20] These cases clearly do not apply when *religious*

[20] *Harris v. McRae*, 448 U.S. 297, 319 (1980); *McGowan v. Maryland*, 366 U.S. 420, 442 (1961); *see also Lynch v. Donnelly*, 465 U.S. 668 (1984); *Marsh v. Chambers*, 463 U.S. 783 (1983).

groups are enlisted to promote values which, for these groups, are religiously inspired.

There is a vast difference, for example, between the government's enforcement of Sunday Closing Laws and government funding of religious organizations to enforce those laws. *Cf. Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982). Here, as in *McCollum v. Board of Education*, 333 U.S. 203 (1948), there is "direct cooperation between [government] officials and religious [authorities]," in the promotion of religious doctrine. *McGowan*, 366 U.S. at 452 (distinguishing *McCollum* on this basis).

Indeed, cooperation between government and religion in the promotion of religious doctrine lies at the heart of AFLA. Congress explicitly referred to the "complex . . . moral dimensions" of adolescent pregnancy to justify the involvement of religious groups.[21] Congress also expressly acknowledged the peculiar effectiveness of these groups in promoting the values prescribed in AFLA.[22] These determinations reflect Congress's intent to use these groups' religious faith to achieve the statute's objectives. This is far removed from cooperation between government and religious organizations in the delivery of nonideological, religiously neutral welfare services. *See, e.g., Bradfield* v. *Roberts*, 175 U.S. 291 (1899); *see also Wolman*, 433 U.S. at 244.

Because AFLA supports activities at the core of religious grantees' religious mission, the only remaining question is whether this aid is "direct and substantial." *Grand Rapids*, 473 U.S. at 393; *Wolman*, 433 U.S. at 250. If aid in the form of teachers and instructional material

[21] S. Rep. No. 161, *supra* note 3, at 15-16 ("Recognizing the limitations of Government in dealing with a problem that has complex moral and social dimensions, the committee believes that promoting the involvement of religious organizations in the solution to these problems is neither inappropriate or illegal.").

[22] S. Rep. No. 496, 98th Cong., 2d Sess. 10 (1984).

to religious institutions is "direct and substantial" aid prohibited by the Establishment Clause,[23] there can be no doubt that the aid provided by AFLA—cash grants to religious entities for education and counseling—is "direct and substantial." This is the form of aid "most clearly prohibited under the Establishment Clause." *Grand Rapids*, 473 U.S. at 395; *see also Lemon*, 403 U.S. at 616-20.

C. AFLA Creates a Crucial Symbolic Link Between the Government and Religion

A symbolic benefit to religion follows inexorably from Congress's decision to fund the promotion of values by religious organizations that hold those values as matters of religious faith. Congress's decision may have rested on a determination that religious organizations were particularly effective in providing guidance on the "complex moral and social dimensions" of premarital sex and abortion. But just as the words of the servant are imputed to the master, so the voice of an AFLA-funded religious entity is heard as the voice of civil authority.[24] Such a message of governmental endorsement of religious values violates a "core purpose" of the Establishment Clause. *See, e.g., Grand Rapids*, 473 U.S. at 389; *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring).

AFLA directs its message at youth, who are especially likely to feel its influence. *See Grand Rapids*, 473 U.S. at 390; *see also Edwards v. Aguillard*, 107 S. Ct. 2573, 2577 (1987); *Wallace v. Jaffree*, 472 U.S. 38, 60 n.51 (1985). On its face, the statute limits services primarily to those eighteen years old and younger. 42 U.S.C.

[23] *See Grand Rapids*, 473 U.S. at 395 (aid in the form of teachers and instructional equipment); *Wolman*, 433 U.S. at 248-51 (instructional materials); *Meek*, 421 U.S. at 365-72 (same).

[24] *Cf. McCollum*, 333 U.S. at 227-28 (separate opinion of Frankfurter, J.).

§§ 300z(b), 300z-1(a)(2), (9). The record indicates that several religious grantees targeted audiences much younger than 18. For example, St. Margaret's Hospital offered AFLA programs to children in kindergarten through sixth grade (J.A. at 465), and Catholic Charities of Arlington, Virginia conducted AFLA program for junior high school students (J.A. at 212).

Distinct from the impermissible symbolic benefit accorded by AFLA to religion in general is the offense of AFLA's support for the creeds of particular denominations. The values that AFLA requires grantees to promote—favoring premarital sexual abstinence over contraception and adoption over abortion—are ones over which various religious denominations sharply disagree. *See Walz*, 397 U.S. at 695 (separate opinion of Harlan, J.). AFLA on its face takes sides on these issues. This by itself is not impermissible. But in making funds available to religious organizations to teach on these issues, AFLA inevitably excludes from participation religious organizations whose faith requires them to promote views that do *not* conform with AFLA's values.[25] "Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community." *Lynch*, 465 U.S. at 688 (O'Connor, J., concurring).

In sum, the resulting message of disparagement of certain religions and endorsement of others arises not merely from the government's promotion of values that conform with those of certain denominations. It arises as well from the government's enlistment in a public undertaking of those religious organizations whose faith will make them particularly effective at promoting these values. The First Amendment "rests upon the premise

[25] *See, e.g.*, J.A. at 603-04 (affidavit of Director of the Religious Coalition for Abortion Rights).

that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere." *McCollum*, 333 U.S. at 212. *Accord Aguilar* v. *Felton*, 473 U.S. 402, 410 (1985). AFLA rests on an altogether different premise.

II. AFLA FOSTERS EXCESSIVE ENTANGLEMENT BETWEEN GOVERNMENT AND RELIGION

A. AFLA's Impermissible Effects Are Unavoidable

The impermissible effects of AFLA grants to religious organizations could not be avoided even if the statute purported to prohibit the use of the grants for religious instruction. This Court has consistently held that direct aid for education and counseling of youth "inevitably" advances the religious mission of religious recipients, regardless of purported restrictions on its use. None of the authority relied on by the Government contradicts this principle.

The Government's reliance on decisions involving aid to religious organizations for religiously neutral welfare services is misplaced. Such services—diagnostic health testing, for example—comprise only a minor part of AFLA activities. Certainly, religious organizations were not included in AFLA because they were "particularly effective" in performing such tasks. Instead, the dominant purpose of AFLA funding was to enlist religious entities in providing "guidance" that will encourage adolescents to abstain from sex and choose alternatives to abortion.[26] Precedent concerning aid to religious organizations for social welfare services does not apply in the context of education and counseling.[27]

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[26] *See* 42 U.S.C. § 300z(b)(1), (2); S. Rep. No. 161, *supra* note 3, at 7-8, 20.

[27] As the Court has stated:

> "The reason for considering diagnostic services to be different from teaching or counseling is readily apparent. First, diagnostic services, unlike teaching or counseling, have little or no educational content and are not closely associated with the educational mission of the nonpublic school. Accordingly, any pressure on the public diagnostician to allow the intrusion of sectarian views is greatly reduced. Second, the diagnostician has only limited contact with the child, and that contact involves chiefly the use of objective and professional testing methods to detect students in need of treatment. The nature of the relationship . . . does not provide the same opportunity for the transmission of sectarian views as attends the relationship between teacher and student or that between counselor and student."

Wolman, 433 U.S. at 244. *See also Meek*, 421 U.S. at 371.

The Government's reliance on decisions involving aid to religious organizations for higher education is likewise misplaced. Those decisions rely on factual and legal circumstances not present here. Specifically, in the college aid decisions instruction took place "in an atmosphere of academic freedom rather than religious indoctrination," and the recipients of aid were not otherwise "pervasively sectarian." *Roemer*, 426 U.S. at 750, 755-56.[28] Thus, it was the non-"pervasively sectarian" character of the institutions—which was manifested by, among other things, their dedication to intellectual openness—that rendered express statutory prohibition on religious uses enforceable.[29] In sharp contrast, many of the religious entities that have received AFLA funds were "pervasively sectarian."

Moreover, unlike the laws involved in the college aid decisions, AFLA does not even purport to prohibit the religious uses of funds. Nor does it purport to promote intellectual openness. In fact, the structure of the statute is antithetical to freedom of inquiry. Discussion of the positive aspects of abortion is absolutely prohibited under

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[28] *See also Hunt v. McNair*, 413 U.S. 734, 736 (1973); *Tilton*, 403 U.S. at 686-87.

[29] *See Roemer v. Maryland Public Works Board*, 426 U.S. 736, 756 (1976); *Tilton*, 403 U.S. at 686; *cf. Widmar v. Vincent*, 454 U.S. 263 (1981).

the statute, and so in most cases is discussion of contraception.[30] Moreover, AFLA's administrators construed and applied these restrictions with a vengeance. For example, grantees were advised by OAPP that they "should not even know how to *spell* the word abortion" (J.A. at 93 (emphasis added)), even though the statute permits abortion referrals under certain conditions. *See* 42 U.S.C. § 300z-10. Finally, religious grantees, as the Government puts it, "are agreeable to the[se] restrictions by virtue of their religious beliefs." U.S. Brief at 33 (footnote omitted). This is understatement in the extreme. Many religious grantees by virtue of their beliefs refused to provide complete information on contraception and abortion even in the limited circumstances permitted under the statute.[31]

B. Any Attempt To Avoid AFLA's Impermissible Effects Would Violate the Principle of Nonentanglement

Any attempt to prohibit religious uses of AFLA funds would entail excessive entanglement between government and religion. Like AFLA, the laws struck down in *Lemon* provided financial subsidies directly to religious organizations for education and counseling of youth by instructors subject to the control of religious authorities. *See* 403 U.S. at 607-10. Like AFLA religious grantees, the recipients of the aid in that case were affiliated with

[30] 42 U.S.C. §§ 300z-3(b), 300z-10; S. Rep. No. 161, *supra* note 3, at 13, 20.

[31] *See, e.g.*, J.A. at 300, 310-11 (St. Ann's would not provide abortion referrals or information on contraception because of Catholic Church doctrine); J.A. at 314-17 (grant proposal of St. Ann's proposed to teach only the hazards of those birth control methods which were not approved by the Catholic Church); J.A. at 379-82 (Family of Americas Foundation's AFLA curriculum taught only negative aspects of abortion); J.A. at 407-09 (for religious reasons, St. Margaret's would not provide abortion referrals under any circumstances).

churches and dedicated to promoting the teachings of their church. *Id.* at 615-16, 620. They provided instruction, as have many AFLA-funded religious grantees, in pervasively sectarian settings. *Id.* at 615. Thus, in this case, as in *Lemon*, in order to prohibit religious uses of government aid, "comprehensive, discriminating, and continuing . . . surveillance [would] inevitably be required . . . . These prophylactic contacts [would] involve excessive and enduring entanglement between state and church." *Id.* at 619.

The degree of surveillance necessary under AFLA would likely be greater than that found excessive in *Aguilar v. Felton*, 473 U.S. 402 (1985). That decision reviewed the use of federal funds to pay the salaries of publicly employed professional educators who taught in parochial schools. These sorts of instructors are surely less likely to engage in religious instruction than are the members of religious orders and employees of religious organizations who conduct many AFLA programs. *See id.* at 427 (O'Connor, J., dissenting).[32]

AFLA's invalidity under an entanglement analysis follows directly from *Lemon* and *Aguilar*, since the subject matter of AFLA instruction concerns values at the core of religious doctrine. Such subject matter creates a greater potential for presentation of religious views than does the traditional subject matter involved in *Aguilar* or *Lemon*. It would entail correspondingly more intense surveillance.

This level of surveillance inevitably would give rise to both of the concerns underlying the nonentanglement principle. *See Aguilar*, 473 U.S. at 409-10. As government involvement in the affairs of those denominations whose views conform to statutorily prescribed views increases, the exclusion of denominations with nonconforming views becomes more apparent, and hence more degrading. At

[32] *Accord Meek*, 421 U.S. at 394 (Rehnquist, J., concurring in judgment and dissenting in part).

the same time, the freedom of those denominations with whom the government is involved also suffers. As the District Court recognized, even if it were possible to require AFLA counselors to put aside their religious beliefs when counseling adolescents, "government would tread impermissibly on religious liberty merely by suggesting that religious organizations instruct *on doctrinal matters* without any conscious or unconscious reference to that doctrine." 657 F. Supp. at 1563 (emphasis in original). The effect is the forced "secularization of a creed." *Lemon*, 403 U.S. at 650 (Brennan, J., concurring).

Moreover, surveillance of religious AFLA grantees would breed an especially pernicious form of political divisiveness. The site of this surveillance would include not only parochial schools, as in *Lemon* and *Aguilar*, but also public schools, for religious grantees operate in both settings. The latter location, as much as the former, is an inappropriate environment for "numerous judgments [by public officials] . . . that may be subtle and controversial, yet may be of deep religious significance to the controlling denominations." *Aguilar*, 473 U.S. at 414. The prospect of religiously inspired disputes erupting in institutions of public education poses a severe threat not present in *Lemon* or *Aguilar*. " 'The public school is at once the symbol of our democracy and the most pervasive means for promoting our common destiny. In no activity of the State is it more vital to keep out divisive forces than in its schools.' " *Edwards v. Aguillard*, 107 S. Ct. 2573, 2577-78 (1987) (quoting *McCollum*, 333 U.S. at 231 (separate opinion of Frankfurter, J.)).

AFLA also creates the more typical form of political divisiveness that has troubled the Court. It sets nonreligious education authorities against religious ones in a battle for scarce government education aid.[33] AFLA

[33] *See, e.g., Meek*, 421 U.S. at 365 n.15; *Nyquist*, 413 U.S. at 794-98; *Tilton*, 403 U.S. at 688-89; *Lemon*, 403 U.S. at 622-25;

affords religious organizations a distinct advantage in this competition by restricting discussion of contraception and abortion. These restrictions are at once "agreeable" to religious groups by virtue of their religious faith, U.S. Brief at 33, and repugnant to nonreligious education groups committed to evenhanded discussion that takes into account the religious and cultural diversity of those whom they serve. Thus, education by religious agencies is nourished at the expense of education by secular agencies.

In short, because AFLA unites government and religion in the promotion of values that lie at the heart of religious doctrine and at the fulcrum of denominational differences, it encourages the strife which the framers intended the Establishment Clause to prevent. "[R]eligious groups inevitably represent certain points of view and not infrequently assert them in the political arena, as evidenced by the continuing debate respecting birth control and abortion laws. Yet history cautions that political fragmentation on sectarian lines must be guarded against." *Walz*, 397 U.S. at 695 (separate opinion of Harlan, J.).

C. AFLA Does Not Even Attempt To Prohibit Religious Uses of Public Funds by Religious Bodies

It is appropriate to analyze the level of government interference with religion that would be necessary to prevent the use of AFLA funds for religious purposes. *See, e.g., Meek*, 421 U.S. at 369-72. This analysis should not, however, obscure the fact that AFLA contains no such restrictions. Assuming for the moment that such restrictions were enforceable, the absence of a statutory prohibition of religious uses itself requires invalidation of

Walz, 397 U.S. at 698-700 (separate opinion of Harlan, J.); *Board of Education v. Allen*, 392 U.S. 236, 249 (1968) (Harlan, J., concurring).

AFLA, regardless whether religious AFLA grantees are deemed "pervasively sectarian." *See Tilton*, 403 U.S. at 682-84.[34] Neither resort to a brief, isolated remark in a committee report nor informal adoption of an agency restriction cures this defect. "[W]here Congress intends to impose a condition on the grant of federal funds, 'it must do so unambiguously.'"[35] The Court cannot save AFLA by construing it to imply a condition that Congress did not see fit to insert.

CONCLUSION

For the foregoing reasons, the judgment of the District Court holding AFLA invalid insofar as it involves religious organizations should be affirmed.

Respectfully submitted.

HERMAN SCHWARTZ
AMERICAN UNIVERSITY
SCHOOL OF LAW
4400 Massachusetts Ave., N.W.
Washington, D.C. 20016
(202) 885-2648

DAVID B. ISBELL
DAVID H. REMES
RICHARD H. SEAMON
COVINGTON & BURLING
1201 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 662-5212

Counsel for Amici Curiae

February 12, 1988

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[34] *Accord Roemer*, 426 U.S. at 759-61; *Hunt v. McNair*, 413 U.S. 734, 744 (1973).

[35] *School Board of Nassau County v. Arline*, 107 S. Ct. 1123, 1132 (1987) (Rehnquist, J., quoting *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1, 17 (1981)) (dissenting opinion).

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES,

Appellant,

—v.—

CHAN KENDRICK, et al.

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF OF THE ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH ON BEHALF OF ITSELF AND AMERICANS FOR RELIGIOUS LIBERTY, *AMICI CURIAE*, IN SUPPORT OF APPELLEES

RUTI G. TEITEL
Anti-Defamation League
of B'nai B'rith
823 United Nations Plaza
New York, New York 10017
(212) 490-2525

Counsel of Record

Of Counsel:

JUSTIN J. FINGER
JEFFREY P. SINENSKY
MEYER EISENBERG
STEVEN M. FREEMAN
Anti-Defamation League
of B'nai B'rith
823 United Nations Plaza
New York, New York 10017
(212) 490-2525

QUESTION PRESENTED

Whether the District Court erred in holding that the Adolescent Family Life Act, 42 U.S.C. §§ 300z, violates the establishment clause of the first amendment?

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BRIEF OF THE ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH ON BEHALF OF ITSELF AND AMERICANS FOR RELIGIOUS LIBERTY, *AMICI CURIAE*, IN SUPPORT OF APPELLEES

Amici support the position of appellees and respectfully submit that the judgment of the United States District Court for the District of Columbia in the above captioned case be affirmed.[1]

STATEMENT OF THE CASE

Amici incorporate the statement of the case as set forth in the Brief of Appellees.

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1 Appellants and Appellees have consented to the filing of this brief and their letters of consent are filed with the Clerk of the Court.

INTEREST OF THE *AMICI CURIAE*

The Anti-Defamation League of B'nai B'rith was organized in 1913 to advance good will and mutual understanding among Americans of all creeds and races, and to combat racial and religious prejudice in the United States. The Anti-Defamation League has always adhered to the principle that the above goals and the general stability of our democracy are best served through the separation of church and state and the right to free exercise of religion.

In support of this principle, the League has previously filed as friend of the court in numerous cases dealing with issues of financing religious education, *see, e.g., Witters v. Washington Department of Services*, 474 U.S. 481 (1985); *Grand Rapids v. Ball*, 473 U.S. 373 (1985), as well as concerning prayer and other religious activities in the public schools, *see, e.g., Bender v. Williamsport*, 475 U.S. 534 (1986); *Wallace v. Jaffree*, 472 U.S. 38 (1985); *Widmar v. Vincent*, 454 U.S. 263 (1981); *Abington v. Schempp*, 374 U.S. 203 (1963). In the instant case, the League is able to bring to the issues raised on this appeal the perspective of a national organization dedicated to safeguarding all persons' religious freedoms. The Anti-Defamation League submits the accompanying brief because we believe the instant case raises serious questions concerning government support of religion in contravention of the establishment clause of the first amendment.

Americans for Religious Liberty (ARL) is a nonprofit, nationwide educational organization whose members represent the entire religious spectrum. ARL is dedicated to defending religious liberty for all persons. It maintains the defense of religious liberty requires the strictest adherence to the constitutional principle of separation of church and state, and that strict religious neutrality is required of our public schools by the first amendment.

INTRODUCTION

The Adolescent Family Life Act, 42 U.S.C. §§ 300z ("AFLA"), in its provisions on care and prevention services involving teaching and counseling, authorizes an arrangement whereby the federal government funds the dissemination of religious doctrine concerning marriage, sexual relations and abortion by participating religious organizations. This dissemination occurs at churches or parochial schools. It occurs pursuant to overtly religious Christian curricula prepared by churches. The counseling often involves religious proselytizing—references to "God," to "Jesus Christ," to "Christianity" or "Christian values."

These religious overtones inhere in the AFLA program. It runs afoul of the first amendment establishment clause by being one of "those involvements of religious with secular institutions which . . . serve the essentially religious activities of religious institutions . . . [and] use essentially religious means to serve governmental ends, where secular means would suffice." *Abington School District v. Schempp*, 374 U.S. 203, 295 (1963) (Brennan, J., concurring).

It is not simply that government and religious organizations here have a coincidence in mission. For both may oppose the evils of teenage pregnancy and both may share the laudatory goal to counsel against this evil. The issue is whether government may use the shortcut of existing religious organizations' chastity programs to reach its own secular ends. Under an "AFLA" like approach to other life and death issues, such as homicide, where government and religious organizations share concerns, government, instead of, or in addition to, establishing District Attorneys' offices, jails, etc. would finance church sermons and parochial school classes on the Biblical injunctions on "loving one's neighbor." If there were such a program, as in the instant case, government would be financing the missions of certain churches—religious means for secular ends. *See Abington*, 374 U.S. at 295. As under the AFLA, while the ends served would be laudable—the means would be religious and impermissible.

The AFLA program epitomizes the worst danger protected against by the establishment clause—the government sponsoring of religious doctrine to impressionable teenagers. To ask that government create its own programs rather than implement the existing ones of church organizations raises no issue of religious liberty. And, to ask that religious organizations pay for their own counselors frustrates no religious end. To the contrary, it would free the programs of these meddlesome governmental limits necessary to insure that the programs serve their goals free of sectarian indoctrination.

This case presents the first instance of congressional legislation invalidated as a "law respecting an establishment of religion." U.S. Const. amend. I. Most recently reaffirmed in *Edwards v. Aguillard*, 107 S.Ct. 2573 (1987), this Court has long applied a three-part test to determine whether legislation comports with the establishment clause. First, the legislature must have adopted the law with a secular purpose. Second, the statute's principal or primary effect must be one that neither advances nor inhibits religion. Third, the statute must not result in an excessive entanglement of government with religion. *Lemon v. Kurtzman*, 403 U.S. 602, 612-613 (1971). State action violates the establishment clause if it fails to satisfy any of these prongs. *Amici* herein maintain the AFLA violates all three parts of the *Lemon* test.

The instant case calls for a heightened scrutiny because the Act's programs are targeted to the counseling of teenagers. Where government, religion and school age children are mingled, this Court has shown particular concern. *E.g., Edwards*, 107 S.Ct. 2573, 2577.

Another reason for added concern here is the possibility not merely of some generalized support of government for religion, but rather of preferred support for some religions over others. The objectives served by the AFLA legislation are shared by some religions—namely Christian ones—more than others. Accordingly, the statute offers to some religions great benefits—to others none at all. This presents the worst establishment clause problem—the spectre of the preferred church. *See Lynch v. Donnelly*, 465 U.S. 668, 678 (1984).

ARGUMENT

A. THE AFLA'S PREDOMINANT PURPOSE IS TO ENHANCE THE CHASTITY PROGRAMS OF RELIGIOUS ORGANIZATIONS.

The district court below considered whether the enactment of the AFLA was "motivated wholly by religious considerations;" and determined pursuant to this inquiry that the AFLA had a secular purpose. 657 F. Supp. at 1558.

Yet, the relevant purpose inquiry looks not to whether the sole purpose for the AFLA is religious, but rather to which is its "actual," "clear," "chief" or "predominant" purpose. As recently applied by this Court, "[t]he purpose prong of the *Lemon* test asks whether government's actual purpose is to endorse or disapprove of religion." *Edwards*, 107 S.Ct. at 2578, *citing Lynch*, 465 U.S. at 668, 690. *See Stone v. Graham*, 449 U.S. 39, 41 (1980).

As applied herein, the relevant inquiry asks what purpose the AFLA serves not adequately served by its predecessor statute, Title VI of the Public Health Service Act. *See, e.g., Wallace v. Jaffree*, 472 U.S. 38, 59 (1985). *See also May v. Cooperman*, 780 F.2d 240 (3d Cir. 1985), *appeal dismissed sub nom. Karcher v. May*, ___ U.S. ___, 108 S. Ct. 338 (1987). Title VI required applicants to involve "public and private agencies," *see* Title VI § 605 (a)(7). The AFLA, however, explicitly *requires* applicants to describe how they will "involve religious and charitable organizations, volunteer associations, and other groups in the private sector. . . ." 42 U.S.C. § 300z-5(a)(21).

In its statutory analysis, the district court rightly noted the AFLA's requirement of involvement of "religious organizations." But the district court held this was not enough evidence of the statute's exclusive religious purpose. 657 F. Supp. at

1559. Yet as discussed *supra*, this is too narrow a statement of the purpose inquiry. The AFLA's language amending the prior statute to include "religious organizations" points to what may have been the "actual" or "preeminent" purpose for the government legislation. *See Edwards*, 107 S.Ct. at 2528. Indeed, as the legislative history indicates, and appellants recognize, through the AFLA Congress expressly intended to draw upon the existing programs of religious organizations. S. Rep. 97-161 at 16, 97th Cong., 1st Sess. (1981), *cited* in Brief for the Appellants at 7-8. This legislative purpose threatens "the core rationale underlying the establishment clause . . . preventing 'a fusion of governmental and religious functions,' " *Larkin v. Grendel's Den*, 459 U.S. 116, 126 (1982), *citing Abington*, 374 U.S. at 222.

B. INSOFAR AS THE AFLA IMPLEMENTS RELIGIOUS ORGANIZATIONS TO COUNSEL TEENAGERS ON CHASTITY VALUES, IT HAS THE PRIMARY EFFECT OF ADVANCING RELIGION GENERALLY AND IN PARTICULAR THOSE RELIGIONS THAT PROMOTE CHASTITY.

1. The AFLA Prefers Those Religions Which Have Programs Indoctrinating In Favor Of Abstinence And Against Premarital Sexual Relations And Abortion.

a. The AFLA is Unconstitutional Under *Larson* For Discrimination Amongst Religions As Applied.

In funding religious organizations to educate and counsel concerning sex, marriage and abortion just as they would otherwise do, pursuant to their religious mission—through the use of religious curricula, religiously trained counselors and religious locales such as churches or parochial schools, the AFLA subsidizes certain religions in their religious missions, namely, as the record reflects, Catholic organizations.

In evaluating the constitutionality of this scheme, the district court held the AFLA survived "strict scrutiny" under *Larson v. Valente*, 456 U.S. 228 (1982), because the AFLA did not expressly discriminate amongst religions on its face. 657 F. Supp. at 557. Yet, even in the absence of discriminatory statutory language, this Court has long evaluated statutes and governmental policies for the preference or endorsement of one religion over another. *See Wallace v. Jaffree*, 472 U.S. 38, 106 (1985) (Rehnquist, J., dissenting); *Lynch v. Donnelly*, 465 U.S. at 678. Since *Everson v. Board of Ed.*, 330 U.S. 1, 15, this Court has adhered to the principle, that no state can "pass laws which aid one religion" or "prefer one religion over another." As applied, the AFLA discriminates amongst religions insofar as it funds certain religions in the teaching of their values on marriage, sexual relations and abortion, while barring any aid to religions whose approaches differ. Such discrimination serves no compelling interest, and thus violates the test set forth in *Larson*.

b. The Record Shows Participating Religious Organizations Are Exclusively Christian and the Programs Involve Promulgation of Christian Doctrine.

The AFLA only funds the work of those religious organizations adhering to certain views on marriage, sexual relations, and abortion. The funded programs form an integral part of the participating religious organizations' broader education program promulgating their own religious doctrine—and not those of other religions. Thus, the adoption policy of Catholic Family Services, Amarillo, Texas, is "because of its religious doctrine." J.A. 156. The goal of Family of the Americas Foundation's Parental Adolescent Program "[is] to develop and disseminate in educational programs based upon the teachings of the Catholic church." J.A. 390. Catholic Charities of Arlington's program deals with the "values of the Church and community" and "the church's teachings on birth control and premarital sex." R. 155, A, III, 337-347; 222-A; 344-A-B

(Larson exh. 12; West dep. p. 137; Larson dep. pp 46-47). A priest lecturing for Catholic Charities relied throughout on Roman Catholic teachings "basing it all on Jesus Christ," with no mention of Jewish or Protestant teachings. R. 155, A, III-A, 401-403. (Hortum dep. pp. 37-38).

No Jewish organization, Reform, Conservative or Orthodox, has obtained any funding under this Act. While the Jewish view toward marriage, sexual relations and abortion is far from monolithic, it differs sharply from those adopted by the Christian grantee organizations.

As concerns sexual relations and marriage, in Judaism as opposed to Christianity, sex is considered a natural, and not a negative impulse. In Judaism, marriage is the highest human state, and not celibacy, as in Christianity. *Compare Kiddushin* 29b *with Matthew* 19:10. *See Genesis* 2:18, 24.

As concerns marriage and divorce, the Jewish view differs from the Christian in not considering marriage to be a sacrament, since its dissolution is possible. *Compare Deuteronomy* 24:1-4 *with Matthew* 19:16; *Mark* 10:9. As to abortion, most notably in Judaism, the fetus in the womb is not a person. B. Brickner, *Judaism and Abortion, Contemporary Jewish Ethics* 281 (1978), *citing* Rashi, Yad Ramah, & Meiri, *Sanhedrin* 72b. The Jewish view towards the status of a fetus is found in the Mishnah, a code of laws that dates back to the second century and forms the basis of the Talmud. Rashi, its preeminent commentator, explains "as long as the child did not come out into the world it is not called a living being, and it is therefore permissible to take its life in order to save the life of its mother." *Id.* at 271. This Jewish view conflicts sharply with the Christian view concerning the dilemma over the mother and the fetus.

That only the Christian and not the Jewish view on sexual relations, marriage, divorce, and abortion, are being taught pursuant to the AFLA is recognized by programs run by St. Ann's. Its resource material stated:

> Our purpose here is not a discussion of comparative religions. . . . Our purpose is to explain what Christians mean by the transcendent level of life, a sharing in the life of God. . . .
>
> Intercourse between married people is a way of saying with Christ, "my flesh, for the life of the world". . . .
>
> The Jewish law allowed divorce under certain circumstances, but when Jesus was asked "may a man divorce his wife for any reason whatever?" he replied "let no man separate what God has joined."

R. 59 (O'Keefe Dep., Exh. 15).

No government monies should be promoting one religion's values over another. To do so is to threaten the religious beliefs of non-promoted religions. "[T]he first realization of true religious liberty requires that government . . . effect no favoritism among sects . . . and that it work deterrence of no religious belief." *Abington*, 374 U.S. at 305. The AFLA's programs allow "precisely the sort of official denominational preference that the Framers of the First Amendment forbade." *Larson*, 456 U.S. at 255.

2. Under *Lemon*, The AFLA Is Unconstitutional Both On Its Face And As Applied For Having The Primary Effect Of Advancing Religion.

The district court below found the AFLA's funding of teaching and counseling by religious organizations in matters constituting religious doctrine had the primary effect of advancing religion. The court found this impermissible, whether or not all the grantee religious organizations were determined to be "pervasively sectarian," because the financial aid provided under the AFLA as implemented by participating religious organizations is so inextricably tied to religious matters it cannot be confined to secular use; and thus cannot be constitutionally funded by government.

At the heart of the establishment clause's mandate is the bar on government aid to religious goals. "The State must confine itself to secular objectives, and neither advance nor impede religious activity." *Roemer v. Board of Public Works*, 426 U.S. 736, 747 (1976). Direct aid—not limited to secular use—the Court has consistently found to have a primary effect of advancing religion. *See, e.g., Wolman v. Walter*, 433 U.S. 230 (1977) (provision of field trip transportation to nonpublic school students found to be an "impermissible direct aid to sectarian education"); *Meek v. Pittenger*, 421 U.S. 349 (1975) (loan of instructional materials and equipment to nonpublic schools found to "inescapably result in the direct and substantial advancement of religious activity"); *Committee for Public Education v. Nyquist*, 413 U.S. 756 (1973) (holding maintenance and repair grants to nonpublic schools "subsidize directly the religious activities of sectarian elementary and secondary schools").

The aid provided to religious organizations under the AFLA, the district court held, cannot be restricted to secular use because it directly subsidizes religious organizations in their religious missions. Determining the likelihood that aid will be for religious use is a twofold inquiry. Under *Hunt v. McNair*, it is barred: "when funding flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission or when it funds a specifically religious activity in an otherwise substantially secular setting." 413 U.S. at 734.

a. Through Institutional Ties To Religious Denominations and Corporate Requirements, Many of the Participating Religious Organizations Have a Primary Religious Purpose.

The district court below found pursuant to the twofold inquiry in *Hunt* that there is a likelihood of religious use on the face of the AFLA because the Act permits funding of a

number of organizations which are "pervasively sectarian."[2] While this characterization is not dispositive of the constitutionality of aid,[3] it is relevant insofar as the limitation on aid for secular and not religious use simply cannot be drawn by institutions whose activities are permeated by religion. *Hunt*, 413 U.S. 737, 743 (1973).

The test used by this Court and by the district court below is a functional one, which depends on its facts. In its landmark case on the issue, *Bradfield v. Roberts*, the Court looked to a hospital charter of incorporation to determine whether its purpose was religious. 175 U.S. 291 (1899) (upholding construction grant to hospitals whose charter was silent on the question of the hospital's purpose). In *Tilton v. Richardson*, the Court allowed aid where religion did not so permeate the colleges "that their religious and secular functions were inseparable. On the contrary, there was no evidence that religious activities took place in the funded facilities. . . . [A]n atmosphere of academic freedom rather than religious indoctrination was maintained." 403 U.S. 672 (1971). Similarly in *Hunt*, the Court looked to whether "religion is so pervasive" in an institution "that a substantial portion of its functions are subsumed in the religious mission." 413 U.S. 737, 743 (1973). Also relevant to the consideration is the degree of autonomy from the sponsoring denomination, *Roemer v. Board of Public Works*, 426 U.S. 736, 755 (1976).

As applied to the grantees under the AFLA, the district court below examined the corporate purposes of the grantees

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2 The court used the term "religious organization," which it defined as organizations "that have explicit corporate ties to a particular religious faith and by-laws or policies that prohibit any deviation from religious doctrine." 657 F. Supp. at 1565.

3 The question is not whether an organization is "pervasively sectarian." For even a pervasively sectarian organization such as a church is allowed secular aid such as fire or police protection. *See Everson v. Board of Education*, 333 U.S. 1, 17-18 (1947).

and held under *Bradfield* that at least 10 were "religious organizations" in that they had "explicit corporate ties to a particular religious faith and bylaws or policies that prohibit any deviation from religious doctrine."[4] *See* 657 F. Supp. at 1565 & n.16. In addition to those with formal corporate ties listed by the court below, at least four others were affiliated with religious denominations. Emory University's program is affiliated with the Methodist Episcopal Church. J.A. 504. Brigham Young University's program is "founded, supported and guided" by the Church of Jesus Christ of Latter-day Saints. J.A. 616. Cities in Schools' program is affiliated with an interdenominational religious program, J.A. 572; and Family of Americas Foundation is connected to the Vatican. J.A. 141. Other religious organizations did not have formal institutional ties, but otherwise evidenced "as a substantial purpose the inculcation of religious values." *Aguilar v. Felton*, 105 S.Ct. 3232, 3238 (1985), *citing Nyquist*, 413 U.S. at 767-68.

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4 Appellant United Families of America objects to the district court's analysis of adherence to religious doctrine as an element in the court's inquiry as to whether the grantees would be able to serve a secular mission. *See* Brief of United Families of America at 39. Appellant suggests that adherence to religious doctrine need not impede a grantee's fulfillment of a program's secular objective, and that to bar participants on this basis is to burden the grantees' freedoms under the free exercise clause. *Id.*

Appellant's argument is inapposite. The free exercise clause does not require a government subsidy for religious practice. *See McGowan v. Maryland*, 366 U.S. 420 (1961). If it did, the first amendment religion clauses would work at cross purposes. The constitutionality of the government aid at issue hinges on whether an organization's secular and religious objectives may be separated, thus the question of a grantee's adherence to religious doctrine is central. Where the "religious mission" of an organization is pervasive, *see, e.g., Lemon v. Kurtzman*, 403 U.S. at 616, the Court has disallowed government aid, because state financial aid cannot be limited to supporting secular functions exclusively. *See Committee for Public Education v. Nyquist*, 413 U.S. 756, 783.

Appellants reject the court's characterization of the grantees. They argue "pervasively sectarian" organizations should be limited to churches and church schools. *See* Brief of United Families of America at 39. Yet if this were the relevant consideration, the Court's inquiry in *Tilton*, *Hunt* and *Roemer* would not have looked toward the colleges' purposes. A similar analysis of the participating religious organizations herein reflects their religious mission, and thus the likelihood of use of the government aid herein for religious impermissible purposes. *Hunt*, 413 U.S. at 743.

The record is replete with evidence showing the AFLA programs have in no way been separated from the underlying religious missions of the participating grantee organizations. To the contrary they form an integral part of the participating organizations' broader religious missions. Catholic Family Services indicated its stance on adoption was "because of its religious doctrine." J.A. 156. Its grant program was regarded as "a welcome addition which will provide new opportunities to carry out the mission." J.A. 155. Similarly, St. Margaret's grant application states its services "are provided in accordance with the teachings and philosophy of the Roman Catholic Church." J.A. 459. *See also* J.A. 407.

b. The AFLA Provides Federal Funding to Religious Organizations To Teach Matters Inherently Tied To Religion.

As applied, the AFLA has the primary effect of advancing religion, under the twofold test set forth in *Hunt*, and this Court's recent *Grand Rapids* decision. What troubled the district court was the utter absence under the AFLA of any "effective means of insuring that public funds will be used exclusively for secular, neutral, and nonideological purposes. . . " *Committee For Public Education v. Nyquist*, 413 U.S. 756, 780. This Court has held the mere risk of government funding of religious indoctrination is enough to invalidate a program. "The lack of evidence of specific incidents of indoctrination" was held to be of "little significance."

Grand Rapids, 105 S.Ct. at 3226. *A fortiori* the instant scheme is unconstitutional. For there are specific incidents of unconstitutional funding found by the district court and conceded by appellants.

The AFLA allows tax dollars "to teach matters inherently tied to religion." 657 F. Supp. at 1565. This religiosity is reflected in the curriculum used for AFLA programs, in the lectures of the government funded teachers, in the religious symbolism of the program sites, which are often parochial schools, churches or meeting rooms adorned by crucifixes. This Court has never before allowed government funding for religious books, *see Board of Education v. Allen*, 392 U.S. 236 (1968), for salaries of teachers of religious courses, *McCollum v. Board of Education*, 333 U.S. 203 (1948), nor for teachers of any subject, secular or religious, when the courses are on church or parochial school premises. *Grand Rapids*, 473 U.S. 373; *Lemon*, 403 U.S. 602. Yet this aid is precisely what the AFLA allows.

i. Religious Materials

The use of curricula expounding church doctrine reflects the religiosity of the AFLA funded programs. Government sponsorship of such religious materials has long been unconstitutional. *See, e.g., Abington v. Schempp*, 374 U.S. 203. The district court found St. Margaret's used curricula including explicitly religious materials. J.A. 36a. Catholic Charities of Arlington's program included discussions regarding "the Church's teaching on birth control [and on] premarital sex." R. 155, A, III at 342 (Larson exh. 12, Doc. 4477). The religious curriculum outline used by St. Ann's AFLA program discusses "the Christian tradition" of marriage and relies on Biblical material concerning sexual relations and marriage. Catholic Charities' grant program employed a religious bibliography entitled "Reverence for Life and Family" used in several dioceses for Catholic sex education in parochial schools. *See* J.A. 115-116. *See also* J.A. 379 (Families of the Americas Foundation's pamphlet on "The Christian Alternative, Billings Ovulation Methods" which says the ovulation method helps

show "the family is an integral part of the Church."). Center for Life's Adolescent Program materials provide "a more Christian pro-life education in sexuality," and refer to "a fully human Christian understanding of life and love." J.A. 370-371.

ii. Religious Teaching

Religious indoctrination is not a mere possibility; it is actuality here. The instructors used in the AFLA programs, many of whom are involved in the grantees' non-AFLA religious programming, include church ministers, *see* J.A. 485 (GUAGT Program) or instructors from area churches, *e.g.*, J.A. 476 (SEMO). SUMA and Catholic Charities of Arlington used "spiritual counseling," and "religious discussions" in the midst of an AFLA program. J.S. App. 36a-37a. As this Court recognized in *Lemon* and in *Grand Rapids*, the services of the state-supported—but religiously trained—teachers herein cannot remain purely secular. In *Grand Rapids*, this Court held that parochial school teachers, trained to educate pursuant to the tenets of their church, would not be able to switch gears after the regular parochial schoolday so as to teach an entirely secular course, *see* 105 S. Ct. at 3224. Yet this improbability is exactly what is expected under the AFLA.

iii. Religious Sites

In addition to using religious curricula, many of the grantees conducted their teaching and counseling at churches, parishes and Catholic schools. These included Catholic Social Services, S.W. Ohio; Catholic Charities of the Diocese of Arlington, VA; Families of the Americas, Inc.; Catholic Family Services; and St. Ann's. J.A. 114, 117, 340, 379, 448, 449, 456. Other program sessions have been conducted in meeting rooms adorned with religious symbols, such as crucifixes. J.A. 299; 437 (St. Ann's); J.A. 463 (St. Margaret's).

Government funded programs, this Court has held, may not be conducted on churches or parochial school sites lest there be the appearance of government support of religion. *See Grand Rapids*, 105 S. Ct. at 3225. The Court has also recognized that

religious symbols cannot be endorsed by government. *See Stone v. Graham*, 449 U.S. 39 (1980). *See also ACLU v. City of St. Charles*, 794 F.2d 265 (7th Cir.), *cert. denied*, ____ U.S. ____, 107 S.Ct. 458 (1986) (holding cross is the fundamental symbol of Christianity and cannot be sponsored by government). The Court held in *Grand Rapids* that "students will perceive the instruction provided in the context of the dominantly religious message of the institution, thus reinforcing the indoctrinating effect." 105 S. Ct. at 3225. *A fortiori*, the effect of advancing religion is even stronger here than in *Grand Rapids* because unlike the secular education courses taught in the parochial schools in *Grand Rapids*, the AFLA programs involve the teaching at religious sites of fundamental Christian doctrine.

The holding of AFLA programs on such sites presents a twofold problem. To the believing adolescent it sends a message of endorsement of Christianity. To the unaffiliated adolescent, it sends a further message of exclusion at a time already marked by alienation. *See Lynch*, 465 U.S. at 688 (O'Connor, J., concurring).

iv. Impressionable Teenagers

In funding teaching and counseling on matters related to religious doctrine, the AFLA allows a worst case scenario of "direct, state-funded efforts to indoctrinate youngsters in specific religious beliefs." *Grand Rapids*, 105 S.Ct. at 3226. Like the program in *Grand Rapids*, the AFLA program contemplates teaching of high school aged children by government funded teachers at religious sites. But, unlike the programs in *Grand Rapids* which involved classes in groups, the AFLA contemplates one on one counseling—the situation most ripe for abuse.

"Examination of both the subjective and objective components of the message communicated by a government action is . . . necessary." *See Lynch*, 465 U.S. at 690 (O'Connor, J., concurring). In addition to the objective aid to religious doctrine provided by the AFLA, the district court considered the

subjective element presented by the school age children affected by the program. "[T]he statutory scheme is fraught with the possibility that religious beliefs might infuse instruction and never be detected by the impressionable and underinformed adolescent to whom the instruction is directed." 657 F. Supp. at 1563. This Court has long recognized the relative susceptibility of elementary and secondary school age students to indoctrination. *Compare Lemon*, 403 U.S. 602, *with Tilton v. Richardson*, 403 U.S. 672, 686 (1971). *Cf. Widmar v. Vincent*, 454 U.S. 263, 271. Adolescents are considered by the Court to be impressionable and thus more likely to misunderstand government support for the program herein as government support for religion. *See Edwards*, 107 S.Ct. at 2577.

The problems raised by the implementation of the AFLA cannot be dismissed as isolated establishment violations as the government suggests. *See* Brief for the Appellant at 41. These problems show that the religious nature of the grantee organizations, as well as the inherent tie to religion in funding the instant services, make it difficult to separate the secular from the religious as the first amendment's neutrality mandate requires.

c. The Effect of Advancing Religion is Not Mitigated by the AFLA's Extension of Government Aid to Nonreligious Organizations.

Though the instant program allows direct aid to religious organizations for teaching of matters related to religious doctrine, appellants maintain the establishment clause permits such aid so long as it is also provided to nonreligious organizations; this, appellants suggest, makes the aid "neutral" in nature.[5] *See* Brief of United Families of America at 20-32. Yet this is not the "neutrality" the establishment clause requires. The establishment clause here takes precedence over any fa-

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5 Appellant notes the statute is neutral on its face, and that in practice about one fourth of the grantees are religiously affiliated. Brief of United Families of America at 25 n.14.

cially evenhanded treatment of secular and sectarian organizations. The bar against funding for religious use presents a problem solely for religiously affiliated organizations and this narrows the analysis. *See Lemon*, 403 U.S. at 612.

In one case after another involving state aid to private institutions of higher education, this Court has focused not on the neutrality or merits of state programs as a whole, but rather on the eligibility for aid of specific sectarian recipients. In *Roemer*, for example, the Court analyzed whether four Catholic colleges in Maryland could receive state funds available to all private schools of higher education in that state. 426 U.S. 736 (1976). In *Tilton*, 403 U.S. 672, this Court focused specifically on four church-related colleges in Connecticut to determine their eligibility for federal grants also offered to many other schools. In *Hunt*, 413 U.S. 663, this Court considered the eligibility of one Baptist-controlled college to benefit from the issuance of revenue bonds intended to support all private colleges in South Carolina. In each of these decisions, the Court recognized the secular nature and overall merit of the states' efforts to assist private colleges and universities. Nevertheless, as the *Hunt* Court emphasized, to identify primary effect it is necessary to narrow the Court's focus "from the statute as a whole to the only transaction presently before us." 413 U.S. at 744. To do otherwise here would be to depart from those establishment clause precedents which have long served effectively to ensure the separation of church and state by limiting government aid to secular use.

Further, the examples of "neutral" aid appellants rely on, which have been permitted to an array of religious and nonreligious beneficiaries, are fundamentally difficult from the aid for teaching and counseling herein. Police and fire protection have long been afforded even to "pervasively sectarian" organizations, *see Everson v. Board of Education*, 333 U.S. 1 (1947). *See also Committee for Public Education v. Regan*, 444 U.S. 646 (1980) (tests); *Wolman v. Walter*, 433 U.S. 230, 241 (1977) (diagnostic services). Unlike government funding of teachers, this sort of government aid presents no risk of converting from permitted secular to forbidden religious use. See *Grand Rapids*, 105 S. Ct. at 3225; *Bd. of Ed. v. Allen*, 392 U.S. 236 (1968) (secular textbooks).

Greater flexibility has been countenanced when government aid goes not directly to a religious institution but indirectly to an individual. It is the "indirect" nature of aid allowed to an individual, and, not the array, the Brief of United Families at 25, to the contrary, which mitigates the effect of government funding for religious training.[6] *See, e.g., Witters v. Washington Department of Services*, 106 S. Ct. 748, 752 (1986). *See Widmar v. Vincent*, 454 U.S. 263 (1981). *See also Mueller v. Allen*, 463 U.S. 388, 398-400 (1983).

Here, unlike in *Witters*, *Mueller*, or *Widmar*, the AFLA affords no aid to individual beneficiaries. There is no private action to attenuate the message of direct government funding to religious organizations for religious education.

C. INSURING THE AFLA IS CONSTITUTIONALLY IMPLEMENTED EXCESSIVELY ENTANGLES STATE AND RELIGION IN VIOLATION OF *LEMON*.

1. Implementing the AFLA Involves Unconstitutional Administrative Entanglement of Government and Religious Institutions.

Under *Lemon*, the AFLA may not foster an "excessive governmental entanglement with religion." 403 U.S. at 612-13. The district court below held the "religious organization" grantees had such religious character and purpose that insuring AFLA funds were isolated only for secular uses would require

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6 Another form of indirect aid is presented by *Walz v. Tax Commission*, 397 U.S. 664 (1970). *Walz* involved an extension of tax exemption to churches. In so doing, *Walz* obviously did not stand for the proposition that it is all right for government to fund churches. Rather, *Walz* presented the Hobson's choice either of government affording churches an exemption, and thus helping churches financially or churches paying taxes and thus aiding government. Presented with these choices, the Court held an exemption would involve less ongoing involvement between government and religious organizations—ultimately advancing the separation of church and state.

a level of surveillance constituting "excessive entanglement." 657 F. Supp at 1567.

Moreover, since the aid at issue is funding for teaching or counseling services, the risk of advancing religion by these religious organizations is attendantly greater—necessitating, the court found, "continual governmental monitoring." 657 F. Supp at 1568.

> Unlike a book, a teacher cannot be inspected once so as to determine the extent and intent of his or her personal beliefs and subjective acceptance of the limitations imposed by the First Amendment.
>
> . . . .
>
> We simply recognize that a dedicated religious person, teaching in a school affiliated with his or her faith and operated to inculcate its tenets, will inevitably experience great difficulty in remaining religiously neutral.
>
> . . . .
>
> These prophylactic contacts will involve excessive and enduring entanglement between state and church.

Lemon, 403 U.S. at 618-619.

Even the mere potential of such continuous monitoring of government with religion in situations involving state funded teaching has been deemed excessive and violative of the first amendment. *See Aguilar v. Felton*, 473 U.S. at 410. But, under the AFLA, such continual monitoring is not a risk, but a reality.

The record reflects that government has already been involved in continuous supervision of the religious organizations for abuses in the AFLA programs. In conceding the "departure from proper constitutional principles in individual AFLA programs," Brief of Appellant at 40-41, the government noted that the unconstitutional abuses in the AFLA programs, including "religious discussions" J.S. App. 36a (SUMA), were rapidly "met with firm action by the Secretary." *Id.* at 41. The

supervision has included correspondence, J.A. 518 (HHS letter to St. Margaret's); J.A. 674 (HHS letter to St. Ann's), personal conferences, J.A. 92, and telephone calls, between government officials and religious organization personnel. J.A. 106-107, 112-113, 160 (HHS would affirmatively call Catholic applicants to seek assurances that they would not promote religion).

The AFLA's implementation has already required excessive contacts between administrative personnel of government and church-affiliated organizations. This joining of government and religious enterprises violates the establishment clause's "objective . . . to prevent as far as possible, the intrusion of either [church or state] into the precincts of the other." *Aguilar*, 105 S. Ct. at 3239, *citing Lemon*, 403 U.S. at 614.

Paradoxically, the entangling aspects of the AFLA ultimately diminish the religious freedom of the "benefitting" religious organizations. As held by this Court in *Aguilar*, aid of the sort contemplated here potentially leads to "that kind and degree of government involvement in religious life that, as history teaches us, is apt to lead to strife and frequently strain a political system to the breaking point." 105 S.Ct. at 3241, *citing Walz*, 397 U.S. 664.

2. The AFLA Presents Problems of Political Divisiveness Amongst Religions.

In addition to the administrative entanglement present herein, the AFLA "involve[s] a direct subsidy to . . . religious institutions, *see Lynch*, 104 S.Ct. at 1365, *citing Mueller v. Allen*, 103 S.Ct. 3062, 3071 n.11 (1983), and thus triggers political divisiveness amongst religions.

Given the major distinctions amongst religions on the issues taught pursuant to the AFLA, discussed *supra*, competition for funding under the Act automatically results in political divisiveness along religious lines. *See Lemon*, 403 U.S. at 622. This is one of the central dangers against which the establishment clause was designed to protect. *See Committee for Public*

Education v. Nyquist, 413 U.S. at 798. As Justice Harlan declared, governmental involvement in programs concerning religion:

> [M]ay be so direct or in such degree as to engender a risk of politicizing religion. . . [R]eligious groups inevitably represent certain points of view and not infrequently assert them in the political arena, as evidenced by the continuing debate respecting birth control and abortion laws. Yet history cautions that political fragmentation on sectarian lines must be guarded against. . . . [G]overnment participation in certain programs, whose very nature is apt to entangle the state in details of administration and planning, may escalate to the point of inviting undue fragmentation.

Larson, citing Walz, 397 U.S., at 695 (concurring).

CONCLUSION

For all the reasons above, *amici* ask that the AFLA be declared unconstitutional in violation of the first amendment establishment clause.

Respectfully submitted,

RUTI G. TEITEL
Anti-Defamation League of B'nai B'rith
823 United Nations Plaza
New York, NY 10017
(212) 490-2525

Counsel of Record

Of Counsel:
JUSTIN J. FINGER
JEFFREY P. SINENSKY
MEYER EISENBERG
STEVEN M. FREEMAN
Anti-Defamation League of B'nai B'rith
823 United Nations Plaza
New York, NY 10017
(212) 490-2525

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Nos. 87-253 and 87-431

IN THE
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October Term, 1987

OTIS R. BOWEN, SECRETARY OF
HEALTH AND HUMAN SERVICES
Appellant,

vs.

CHAN KENDRICK, et al.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF COLUMBIA

BRIEF OF THE BAPTIST JOINT COMMITTEE ON PUBLIC AFFAIRS, THE AMERICAN JEWISH COMMITTEE, AND AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE AS AMICI CURIAE IN SUPPORT OF APPELLEES

OLIVER S. THOMAS
Counsel of Record
BAPTIST JOINT COMMITTEE ON PUBLIC AFFAIRS
200 Maryland Ave., NE
Washington, D.C. 20002
(202) 544-4226

RICHARD FOLTON
THE AMERICAN JEWISH COMMITTEE
165 East 56 Street
New York, NY 10022
(212) 751-4000

Attorneys for Amici Curiae

QUESTION PRESENTED

Does the award of grants to religious organizations under the Adolescent Family Life Act, 42 U.S.C. §§300z et seq., violate the Establishment Clause?

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Nos. 87-253 and 87-431

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Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF OF THE BAPTIST JOINT COMMITTEE ON PUBLIC AFFAIRS, THE AMERICAN JEWISH COMMITTEE, AND AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE AS AMICI CURIAE IN SUPPORT OF APPELLEES

Pursuant to Rule 36.2 of the Rules of this Court, the organizations named above file this brief in support of Appellees. Consent for the filing of this brief has

been obtained in writing from the attorneys of record for the parties in this case. Their original letters of consent have been filed with the Clerk of this Court.

INTEREST OF THE AMICI CURIAE

The record in this case is dramatic evidence of the insurmountable constitutional problems created by a grant program that pays religious organizations to teach sexual morality. While we commend these and other religious organizations for aggressively combating sexual promiscuity and teen pregnancy, their efforts necessarily involve the promotion of religion. Because public funds should not be used to advance religion, the following organizations have filed this brief amici curiae:

The Baptist Joint Committee on Public Affairs is composed of representatives from eight national cooperating Baptist conventions and conferences in the United States. They are: American Baptist Churches in the U.S.A.; Baptist General Conference; National Baptist Convention of America; National Baptist Convention, U.S.A., Inc.; North American Baptist Conference; Progressive National Baptist Convention, Inc.; Seventh Day Baptist General Conference; and Southern Baptist Convention. These constituent bodies have a total membership of approximately 30 million and reflect the traditional Baptist concern for proper church-state relations.

The American Jewish Committee, a national organization of approximately 50,000 members, was founded in 1906 to protect the civil and religious rights of Jews. It is the conviction of this orga-

nization that the civil and religious rights of Jews will be secure only when the civil and religious rights of Americans of all faiths are equally secure. To fulfill this aspiration, AJC strongly supports the constitutional principle of separation of religion and government.

Americans United for Separation of Church and State is a non-profit corporation formed to maintain and advance civil and religious liberties through enforcement of the rights and privileges granted by the First and Fourteenth Amendments to the U.S. Constitution and comparable provisions of the state constitutions. Americans United is a national organization of some 40,000 members of various religious beliefs and some of no religious belief in all states of the United States.

Americans United is involved in extensive litigation of First Amendment Free Exercise and Establishment issues throughout the United States, has been involved in many of the major Free Exercise and Establishment Clause cases heard by the U.S. Supreme Court, and is particularly interested in the issues raised by this case.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Adolescent Family Life Act, 42 U.S.C. §§300z et seq. and the First Amendment to the U.S. Constitution, which provides in part:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . .

SUMMARY OF ARGUMENT

It is impossible for religious organizations to teach sexual morality without consciously or unconsciously promoting religion. Therefore, any grant program that subsidizes such activity is constitutionally impermissible. Moreover, any attempt to prevent religious indoctrination in such a program would lead to excessive entanglement between government and religion.

The unique combination of education (i.e., teaching, counseling and referral services) with a fundamental moral issue (i.e., premarital sex and abortion) distinguishes this case from those upholding programs that subsidize the provision of purely secular services (e.g., housing and medical care) by religious organizations. This case is also distinguishable from those permitting government to pursue secular policies that happen to coincide with widely held religious beliefs. In stark contrast, the Adolescent Family Life Act [hereinafter "the Act" or "AFLA"] pays religious organizations to promote their religious doctrines because they happen to coincide with government policy. While we commend Congress for combating teen pregnancy, this daring attempt to use religious education to accomplish the secular goals of government must not be allowed.

ARGUMENT

I.

THE AWARD OF AFLA GRANTS TO RELIGIOUS ORGANIZATIONS HAS THE PRIMARY EFFECT OF ADVANCING RELIGION REGARDLESS OF WHETHER OR NOT THOSE ORGANIZATIONS ARE PERVASIVELY SECTARIAN.

You want to know the church teachings on sexuality? You are the church. You people sitting here are the body of Christ. The teachings of you and the

things you value are, in fact, the values of the Catholic Church.

. . . . . .

The Good news about people is that we are called to the fullness of life. We are called to this through relationship with Jesus Christ. We are called to live simultaneously on four levels: the physical, the cultural, the personal and the transcendent, which means "spiritual" or "graced."

The good news about sex is that it has meaning and values on all four of these levels. . . .

. . . . . .

By acquainting young people with the marvelous signs of fertility alive in their own bodies, the RAINBOW Program provides not only a more Christian, pro-life education in sexuality than that available in the public sector, but also fosters in teens a sense of wonder and respect for their bodies that connects sexuality to the transmission of life and places them both solidly within the context of committed marital relationships

-- Excerpts from lectures and materials used in conjunction with AFLA-funded programs. (J.A. 226, 369-370).

A fundamental tenet of religious liberty and its corollary, church-state separation, is that no person should be taxed to support the propagation of religion. Taxing for the support of

religion is "sinful and tyrannical," wrote Jefferson.[1]

Because religious organizations should be dependent upon their own financial resources and not upon those of the state, the Court has scrutinized carefully any legislative scheme that diverts public monies to religious institutions. The Court's approach, which is both straightforward and succinct, has been set forth clearly in a number of cases.

First, "no state aid at all [may] go to institutions that are so 'pervasively sectarian' that secular activities cannot be separated from sectarian ones. . . ." Roemer v. Board of Public Works, 426 U.S. 736, 755 (1976); Hunt v. McNair, 413 U.S. 734, 743 (1973). "Even though earmarked

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[1]Thomas Jefferson, A Bill for Establishing Religious Freedom, as quoted in William Lee Miller, The First Liberty: Religion and the American Republic (New York: Alfred A. Knopf, 1986), Appendix I.

for secular purposes, 'when it flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission,' state aid has the impermissible primary effect of advancing religion." Meek v. Pittenger, 421 U.S. 349, 365-66 (1975) (quoting Hunt, 413 U.S. at 743).

Second, "if secular activities can be separated out, they alone may be funded." Roemer, 426 U.S. at 755; Hunt, 413 U.S. at 743.

In short, only religious institutions that are not pervasively sectarian may receive direct federal financial assistance[2] and, then, only for activities that are wholly secular and segregated

[2]Amici recognize that certain types of indirect financial assistance to pervasively sectarian institutions may be constitutionally permissible. See, e.g., Witters v. Washington Department of Services for the Blind, ___ U.S. ___, 106 S.Ct. 748 (1986).

from the organizations' religious activities.

A. THE FUNDED ACTIVITIES ARE NOT WHOLLY SECULAR AND CANNOT BE SEGREGATED FROM A RELIGIOUS ORGANIZATION'S SECTARIAN ACTIVITIES.

The above-mentioned standards are flagrantly violated by the Act as it applies to religious organizations. The funded activities are not wholly secular and cannot be segregated from the organizations' religious activities. To the contrary, a religious organization's teachings on sexual morality are so intertwined with its religious tenets that it is impossible for the organization to teach the former without directly promoting the latter.[3]

[3]Amicus Catholic Charities, U.S.A. argues that religion and morality are discrete concepts and that the advancement of the one need not imply the advancement of the other. Brief Amicus Curiae of Catholic Charities, U.S.A. and The Catholic Health Association of the U.S., p. 10. Amicus may be correct with regard to some secular organizations. With regard to religious organizations, however, religion and morality are in-

1. Theology and morality are inseparable for the religious community.

Theology and ethics, or morality, are inseparable for the religious community.[4]

---

separable.

[4]In classical Jewish thought "man as a sexual/social being is the image of God" because "all aspects of human life are ultimately related to God." [D. Novak, "Sex, Society & God in Judaism," p. 153 in F. Greenspahn, (ed.), Contemporary Ethical Issues in the Jewish and Christian Traditions (1986).] The Jerusalem Talmud teaches that "It is impossible for man to live without woman; it is impossible for woman to live without man; and it is impossible for both to live without God's presence [Shekhinah]." [Berachot (J. Talm.) 12d.]

One Baptist ethicist has stated:

> In the Hebrew-Christian tradition, sex is a gift of God, a good which can be abused. Hence, there are numerous passages both in Hebrew and Christian scriptures teaching about the sacredness of sex and its proper role in human life. (See, for example, Proverbs 7; Matthew 5; and 1 Cor. 6).
>
> The Bible admonishes families and religious communities to teach their children and constituents sexual morality (Deuteronomy 5, 6; Proverbs 5; Ephesians 6:1-4). Marriage, celibacy, adultery and fornication are interpreted by religious organizations in terms of their religious presuppositions.
>
> -- Statement of Henlee Hulix Barnette, Ph.D., Emeritus Professor of Christian Ethics, Southern Baptist Theological Seminary, to Oliver Thomas, General Counsel, Baptist Joint Committee on Public Affairs, Dec. 7, 1987.

Because it is grounded in theology, morality is simply the practical expression of sincerely held religious beliefs. Examples are pervasive in the Bible: Because the body is the "temple of God,"[5] Christians are exhorted to abstain from premarital sex.[6] Because humankind is made "in the image of God,"[7] Jews and Christians are taught that human life is sacred.

2. Religious organizations cannot promote sexual morality without consciously or unconsciously promoting religion.

Given that sexual morality is a fundamental religious doctrine, it is inconceivable that religious organizations could counsel or teach sexual morality

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[5]1 Cor. 3:16.

[6]1 Cor. 6:13, 18.

[7]Genesis 1:26-27.

without consciously or unconsciously promoting religion. This is particularly true with regard to discouraging abortion and premarital sex (i.e., fornication), which is the stated purpose of the Act.[8]

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[8]That opposition to abortion and premarital sex are fundamental doctrines of many religious organizations in the United States is borne out by their numerous doctrinal statements and resolutions to that effect. See, e.g., excerpt from "Humanae Vitae", encyclical of Pope Paul VI, July 25, 1968:

> ...we must once again declare that the direct interruption of the generative process already begun, and, above all, directly willed and procured abortion, even if for therapeutic reasons, are to be absolutely excluded as licit means of regulating birth.

and excerpt from "Statement on School-Based Clinics," adopted by the National Conference of Catholic Bishops, Nov. 18, 1987:

> The genital expression of human sexuality is ordered to a total giving of oneself to another person in marriage. Because premarital sexual activity divorces sexual intimacy from the total personal commitment which is its only adequate context, such activity fails to live up to the truth of the human person.* [*In addition to the dignity of the human person as such, for the Christian man and woman this sexual experimentation fails to live up to the fundamental call to holiness as expressed in 1 Thess. 4:2-5 and 1 Cor. 6:13-15, 17-20.] This is why we counsel young people to respect God's law which calls for sexual abstinence before marriage.

and 1984 Southern Baptist Convention Resolution No. 8 — "On Abortion":

> WHEREAS, The Southern Baptist Convention . . . in June 1982, clearly stated its opposition to abortion . . . and
>
> WHEREAS, In addition to legislative remedies for this national sin, it is incumbent that we encourage the woman who is considering abortion to think seriously about the grave significance of such action by presenting information to her about the unborn child in her womb, who is a living individual human being, and encourage her to consider alternatives to abortion; and
>
> WHEREAS, Christlike love requires that such alternatives be made available.
>
> Therefore, be it Resolved, That [we] encourage all of [our] institutions, cooperating churches, and members to work diligently to provide counseling, housing, and adoption placement services for unwed mothers with the specific intent of bringing them into a relationship with Jesus Christ and/or a sense of Christian responsibility; and
>
> Be if further Resolved, That we deplore the practice of performing abortions....

42 U.S.C. §§300z(b) and 300z-10.

The award of AFLA grants to religious organizations constitutes a far more serious threat to religious liberty than did numerous programs aiding religion

that previously have been struck down by this Court. The paying of public monies to religious organizations to promote sexual morality is more constitutionally problematic than supplementing the salaries of parochial school teachers for teaching secular subjects, see Lemon v. Kurtzman, 403 U.S. 602 (1971) and Grand Rapids School District v. Ball, 473 U.S. 373 (1985); providing maps, charts and other instructional materials to parochial schools, see Meek, 421 U.S. 349; furnishing bus transportation to parochial school students for field trips, see Wolman v. Walter, 433 U.S. 229 (1977); or sending public school teachers into parochial schools to teach remedial mathematics, see Grand Rapids School District, 473 U.S. 373, and Aguilar v. Felton, 473 U.S. 402 (1985).

That religious grantees under the Act may not be pervasively sectarian (as were

the grantees in the above-mentioned programs) should not be controlling. These grantees still are religious organizations with "a religious character and purpose." Kendrick v. Bowen, 657 F.Supp. 1547, 1567 (D.D.C. 1987). Their efforts to discourage sexual promiscuity and teen pregnancy, although commendable, must inevitably promote religion.

The first question a pregnant teenager is likely to ask her counselor or instructor is "Should I have an abortion, and if not, why?" Because abortion generally entails less medical risk to the mother than does carrying a fetus to full term,[9] a negative answer would be based on religious rather than medical reasons. The same is true with regard to premarital sex. Why shouldn't teens engage in

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[9]See Christopher Tietze, Induced Abortion, A World Review, 1983 (New York: The Population Council), p. 95; Family Planning Perspectives, January/February 1984, p. 40.

sexual activity if reasonable precautions can prevent disease and pregnancy? Again, for the religious organization, the answer is a fundamentally religious one. As a result, the employees of these religious organizations may "overtly or subtly" indoctrinate their clients or counselees in particular religious tenets at public expense. See Grand Rapids School District, 473 U.S. at 387. Such activity violates the Establishment Clause's strict prohibition against "government-sponsored indoctrination into the beliefs of a particular religious faith." Grand Rapids School District, 473 U.S. at 385. By subsidizing the moral/religious indoctrination of religious organizations, Congress also has violated the Establishment Clause's prohibition against "direct and substantial advancement" of an organization's sectar-

ian enterprise. Grand Rapids School District, 473 U.S. at 394.

B. THE USE OF RELIGIOUS ORGANIZATIONS TO DISCOURAGE PREMARITAL SEX AND ABORTION CREATES A "SYMBOLIC UNION" BETWEEN CHURCH AND STATE AND CONVEYS A MESSAGE OF GOVERNMENT ENDORSEMENT OF RELIGION.

Finally, the Act contravenes the Court's pronouncements against programs that create a substantial "symbolic union" between church and state. Grand Rapids School District, 473 U.S. at 389-92. This symbolic union is especially problematic in a case such as this where the recipients of the government's subsidized services are young, impressionable, and psychologically vulnerable. Indeed, a religious organization may employ the same instructors who teach in a church's religious education program to teach the AFLA curriculum in the same church building.[10] The use of teachers who are

[10]Catholic Charities of the Diocese of Arlington, Virginia, hired facilitators with

clearly identified with an organization's sectarian mission to teach a government-funded program would appear to violate the "Community Education" portion of the Court's decision in Grand Rapids School District, 473 U.S. at 386 (opinion of the Court), and 399 (O'Connor, J., concurring). The overall effect of such a program is to convey an unmistakable message of government endorsement of religion.[11] See Lynch v. Donnelly, 465

A.F.L.A. funds to work on the A.F.L.A. project. All these facilitators were chosen from past or current CCDA staff. All the current case workers at CCDA were hired to be program facilitators in the A.F.L.A. project. One consultant was chosen, in part, because "he was well-known for his work with youth at St. Anthony's parish," and he was teaching religion in a local religious education/CCDA program. R. 155, Statement of Facts, p. 40. Another consultant had taught a sexuality program at St. Luke's parish. R. 155, Statement of Facts, p. 42.

[11] The Act also contains no restrictions against offering these services in a room whose walls are covered with religious symbols or by a teacher who is clothed in clerical garb.

U.S. 668, 690 (1984) (O'Connor, J., concurring).

C. AFLA IS DISTINGUISHABLE FROM GRANT PROGRAMS THAT FUND THE PROVISION OF SECULAR SERVICES BY RELIGIOUS ORGANIZATIONS BECAUSE IT INVOLVES EDUCATION ON A FUNDAMENTAL MORAL ISSUE.

Amici challenge Appellant's assertion that the District Court's holding cannot be logically confined to the Act since every field of social and charitable work may be "religiously motivated."

Religious motivation is not the issue. Most, if not all, of what a religious organization does is religiously motivated, yet some of its activities may be funded by the state and some may not. Again, the question is whether a particular activity is wholly secular and can be segregated from the organization's religious activities. Tilton v. Richardson, 403 U.S. 672 (1971); Hunt, 413 U.S. 734; Roemer, 426 U.S. 736.

Most of the cases cited by Appellant involve the provision of secular services which can be separated from an organization's religious activities and are, therefore, inapposite to the case sub judice.[12] Of the remaining cases, two pre-date Cantwell v. Connecticut, 310 U.S. 296 (1940), and the application of the Establishment Clause to the states via the Fourteenth Amendment,[13] and the remaining one is a U.S. District Court decision involving unique facts and cir-

[12] Bradfield v. Roberts, 175 U.S. 291 (1899); Washington Health Care Facilities Authority v. Spellman, 96 Wash. 2d 68, 633 P.2d 866 (1981); Truitt v. Board of Public Works, 243 Md. 375, 221 A.2d 370 (1966); Craig v. Mercy Hospital - Street Memorial, 209 Miss. 427, 45 So.2d 809 (1950); Kentucky Building Commission v. Effron, 310 Ky. 355, 220 S.W.2d 836 (1949); Community Council v. Jordan, 102 Ariz. 448, 432 P.2d 460 (1967); Richter v. Mayor & Aldermen, 160 Ga. 178, 127 S.E. 739 (1925).

[13] Sargent v. Board of Education, 177 N.Y. 317, 69 N.E. 722 (1904); Dunn v. Chicago Industrial School of Girls, 280 Ill. 613, 117 N.E. 735 (1917).

cumstances (i.e., foster care) that is currently on appeal.[14]

1. Bradfield v. Roberts is not controlling.

Appellant's reliance upon Bradfield v. Roberts, 175 U.S. 291 (1899), in particular is misplaced. First, the Court in Bradfield expressly found that the recipient hospital was not a "religious organization." "The Act of Congress . . . shows there is nothing sectarian in the corporation, and 'the specific and limited object of its creation' is opening and keeping a hospital in the city of Washington for the care of such sick and invalid persons as may place themselves under the treatment and care of the corporation" [emphasis added]. Bradfield, 175 U.S. at 299, 300. Second, even if the hospital were a

[14] Wilder v. Sugarman, 385 F.Supp. 1013 (S.D.N.Y. 1974), modified sub nom. Wilder v. Bernstein, 645 F.Supp. 1292, 329-39 (1986).

religious organization (as are the grantees in this case), the hospital provided a service (i.e., medical care for the city's poor) that could be rendered without invoking or promoting the organization's religious doctrines.

Appellant cites no case upholding a program that pays religious organizations to provide education, counseling and referral services on matters that are fundamental to their religious faith. It is true, as Appellant asserts, that there is nothing "uniquely religious" about sex and pregnancy. "[T]he Bible talks as often about caring for the poor, the widow, the orphan, and the alien as it does about sex."[15] However, there is something "unique" about a program that subsidizes education and counseling by religious organizations on these fundamental religious concerns. While it may be constitutionally permissible for Congress to subsidize the efforts of religious organizations to feed the hungry and shelter the homeless, it would not be permissible to subsidize their efforts to preach to the homeless while feeding and sheltering them.

[15]United Families of America Jurisdictional Statement at 17.

2. Harris v. McRae and McGowan v. Maryland are not controlling.

Amici acknowledge that Congress is not precluded from passing a law solely because its legislative objective coincides with the tenets of some religions. See Harris v. McCrae,[16] 448 U.S. 297 (1980); McGowan v. Maryland, 366 U.S. 420 (1961).

[16]In Harris, the Court stated, "That the Judaeo-Christian religions oppose stealing does not mean that a State or the Federal Government may not, consistent with the Establishment Clause, enact laws prohibiting larceny." 448 U.S. at 319. The Court in no way indicated, however, that the state could subsidize the efforts of religious organizations to discourage larceny whether by counseling, teaching, or otherwise.

Notwithstanding, Congress is precluded from passing laws that have a primary effect of advancing religion. Lemon, 403 U.S. 602. For example, Sunday closing laws may be constitutional, but Congress could not pay religious organizations to discourage Sunday work. Similarly, there are legitimate secular reasons why the state would wish to promote civil relations between neighbors, but surely Congress could not pay religious organizations to teach the Great Commandment, "Love thy neighbor as thyself."[17]

Harris and McGowan both involved the government passing laws that coincide with widely held religious beliefs. Clearly, this is permissible. The Act, on the other hand, stands this arrangement on its head. Instead of promoting a secular policy that happens to coincide

[17]Lev. 19:18 and Matt. 22:39.

with a religious belief as in Harris and McGowan, Congress is paying religious organizations to promote their religious doctrines because they happen to coincide with government policy. While we commend Congress for combating teen pregnancy, this daring attempt to use religious education to accomplish the secular goals of government must not be allowed.

While the mere possibility that public funds might be used for sectarian purposes is sufficient to invalidate an otherwise lawful grant program, Tilton, 403 U.S. at 682-684, the Court need not speculate in this case. The benefits to religion are "direct and immediate," see Estate of Thornton v. Caldor, Inc., 472 U.S. 703 (1985), and are well documented. The record contains numerous examples of AFLA funds being used explicitly to advance religion. See Kendrick v. Bowen, 657 F.Supp. at 1564-66. For example, the

grant application for one program which was funded for at least a year states part of its purpose as teaching "the Catholic diocese, Mormon (The Church of Jesus Christ of Latter-day Saints) and Young Buddhist Association's approaches to sex education." R. 155, A. IV, pp. 409-11. Another AFLA program utilized teaching materials that stated in part: "[T]he best sexual relationships are those that come to people who live by standards of sexual behavior consistent with our values as members of The Church of Jesus Christ of Latter-day Saints. . . ." R. 155, A., IV, p. 102. Still another AFLA project promoted "Family Week" which included a proclamation on Christianity and the family by the city of Troy, Alabama, and a resolution by the Alabama House of Representatives which stated in part: "Whereas, the family is the basic unit of western civilization,

And Whereas, Christians cherish the family . . . And Whereas, the Charles Henderson Child Health Center, area ministers and other community organizations in the City of Troy have set aside Sunday, . . . as a day to honor and strengthen the family. . . ." R. 155, A., IV., pp. 406-407.

These and other examples set forth in the record provide ample testimony to the legal absurdity of a program that pays religious organizations to teach sexual morality and at the same time expects them to refrain from promoting religion.

II.

ATTEMPTS TO PREVENT RELIGIOUS ORGANIZATIONS FROM USING AFLA FUNDS TO ADVANCE RELIGION WOULD LEAD TO EXCESSIVE ENTANGLEMENT BETWEEN GOVERNMENT AND RELIGION.

Any effort to salvage AFLA as it applies to religious organizations would run afoul of the third prong of the Lemon

test, which prohibits excessive governmental entanglement with religion. Lemon, 403 U.S. at 613. The Court in Aguilar, 473 U.S. 402, recently struck down a program similar to AFLA. In fact, Aguilar presented a lesser potential for excessive entanglement than does the Act.

Aguilar involved a challenge to federal financial assistance for local educational institutions to provide remedial programs for educationally deprived children from low-income families. Private parochial schools were among the schools into which public schoolteachers were sent to provide these programs. However, in all cases it was the city which made teacher assignments. The teachers were supervised by state field personnel and, often, the teachers were not of the same faith as the schools they served. Professionals involved in the program were directed to avoid involvement with reli-

gious activities conducted within the private schools and to bar religious materials and religious symbols from the classroom. 473 U.S. at 406-07 (opinion of the Court), and 425 (O'Connor, J., dissenting).

It is noteworthy that the Aguilar program, after nineteen years, had an "unblemished record" of not one single instance of attempted "indoctrination" in "particular religious tenets at public expense." 473 U.S. at 424-25 (O'Connor, J., dissenting). Yet, despite the reliance on public school instructors, and the absence of a single instance in which a teacher was alleged to have promoted religion while providing remedial services, the Supreme Court found the Aguilar program unconstitutional. The institution of a monitoring system, the Court held, inevitably results "in the excessive entanglement of church and

state . . ." because continually overseeing a teacher to ensure that he or she would not convey a religious message constituted "governmental intrusion into sacred matters." 473 U.S. at 409-10. The Court cited, with favor, language from Lemon:

> A comprehensive, discriminating, and continuing state surveillance will inevitably be required to ensure that . . . restrictions are obeyed and the First Amendment otherwise respected. Unlike a book, a teacher cannot be inspected once so as to determine the extent and intent of his or her personal beliefs and subjective acceptance of the limitations imposed by the First Amendment. These prophylactic contacts will involve excessive and enduring entanglement between state and church.

Aguilar, 473 U.S. at 410 (citing Lemon, 403 U.S. at 619).

The Court in Aguilar distinguished Chapter I from those programs aiding religiously affiliated colleges and universities such as that sustained in Roemer, 426 U.S. 736. In providing the latter type of aid, the state would be

able "to identify and subsidize separate secular functions carried out at the school, without on-the-site inspections being necessary to prevent diversion of the funds to sectarian purposes." Aguilar, 473 U.S. at 411 (citing Roemer, 426 U.S. at 765) (emphasis supplied). Unlike Roemer, any meaningful attempt to prevent the use of AFLA funds to support religion would require substantial monitoring through on-site inspections.

The "unblemished" program struck down in Aguilar stands in vivid contrast to the programs created by and funded under the Act. The record is replete with instances in which the AFLA grantees have attempted "indoctrination" in their beliefs at "public expense." Aguilar, 473 U.S. at 424-25. The teaching that has taken place at government expense is not of secular beliefs that "merely happen to coincide" with a religious point of view,

McGowan, 366 U.S. 420, but rather constitutes the teaching of explicitly religious doctrine.[18] Among the many such cases:

--- A curriculum outline for the family life education component of the AFLA program at St. Ann's Infant and Maternity Home states, in its "intimacy section," that the "spiritual" facets of intimacy include: "Meaning of life for both partners, relationship to the universe and God. Meaning of my (and his) existence. Grows over the years, more important with aging." Girls are instructed on the "Christian tradition" of marriage and are referred to four places in the Bible where annotations on marriage can be found. R. 155, A., III-A, pp. 567, 569 (O'Keefe Dep. Exh. 4, pp. 4, 7).

[18] In fact, much of the instruction funded by AFLA has been performed by clergymen.

--- Grantee Catholic Charities of Diocese of Arlington ("CCDA") provides programming in which suggested discussion questions for parents focus on the theme "parents discuss how Catholic values fit into their lives," and suggested discussion questions for teenagers focus on the theme "how Catholic values influence their [teens'] final decision RE: Sex." J.A. 253. Particular discussion questions for teenagers focus on the Church's teachings in such areas as abortion, premarital sex and homosexuality (e.g., "Is homosexuality a sin?"). J.A. 254.

--- Father Hortum of Grantee St. Mark's Church integrated religious beliefs and teachings into his presentation. He

"based it all on Jesus Christ." He referred to Jesus throughout his presentation. J.A. 284. (Hortum Dep. 37).

--- Grantee Charles Henderson Child Health Center provides in its curriculum that "the Family Life curriculum was designed so that it would . . . never contradict [that] which is taught at home or in church, but it should act as a support for these institutions." R. 155, A., IV, p. 404 (Doc. 7674).

While acknowledging that constitutional violations have occurred, Appellant Bowen insists that safeguarding against future violations need require no excessive entanglement between government and religion as long as the religious grantees are not pervasively sectarian. Appellant bases his argument on the fact that every case in which the Court has struck down a

program for potential excessive entanglement involved a church or parochial school. The monitoring of a grantee which is not pervasively sectarian, he argues, is "just that -- monitoring -- precisely the sort of supervision that the government exercises in its many other grant programs." Brief of Appellant Bowen at 42-45. The fact that the institution is not pervasively sectarian is said to alleviate the need for close surveillance because the danger of infusing "ostensible secular activity" with "religious content or significance" is so greatly reduced. Id. at 45.

To be sure, Aguilar involved pervasively sectarian institutions and the Court properly noted this as a factor in its decision. The Court has found that day-to-day monitoring of pervasively sectarian organizations presumptively leads to excessive entanglement because of their

mission of promoting a clear and undiluted religious perspective. Aguilar, 473 U.S. at 413. No such general presumption exists with regard to other religious organizations when, as in Roemer, "the secular and sectarian activities of the [organization] are easily separated." Roemer, 426 U.S. at 764. But when, as here, the aid provided calls upon religious organizations to teach a fundamental moral/religious doctrine, such a separation cannot be made. The record unequivocally confirms this. It reflects not one -- but repeated -- instances of teaching from a religious perspective. Religious grantees simply are not capable of ensuring the avoidance of religious indoctrination when "moral education" is involved. The teaching of such ideological material is not entitled to the presumption of non-endorsement which otherwise might be afforded to

religious institutions which are not pervasively sectarian.

It should be noted that consideration of the character and purposes of a grantee, i.e., whether it is a pervasively sectarian organization, is but one factor the Court has reviewed in determining whether a program runs afoul of the third prong of the Lemon test. Specifically, the Court has considered the nature of the aid and the resulting relationship between government and religion. Lemon, 403 U.S. at 615.

Here, the nature of the aid is intended to promote instruction and counseling from a designated ideological perspective in sensitive areas of family life, marriage, sexuality and abortion. These topics are a major focus of current religious education and are the center of ongoing dissension and debate. They cannot be taught by religious organiza-

tions without the type of monitoring that would lead to impermissible levels of entanglement between government and religion.

III.

DISQUALIFICATION OF RELIGIOUS ORGANIZATIONS FROM PARTICIPATION IN AFLA WOULD NOT VIOLATE THE CONSTITUTIONAL GUARANTEES OF FREE EXERCISE OF RELIGION OR EQUAL PROTECTION OF THE LAWS.

Appellant and his amici have suggested that for religious organizations not to be eligibl for aid of the type provided by AFLA might be violative of their free exercise rights or might deny those institutions equal protection of the laws as guaranteed by the Fifth Amendment. See, e.g., Brief for Appellant United Families of America at 9-11; Brief for Appellant Bowen at 37-38. These oblique contentions are without merit.

Certainly, treating religious persons and organizations differently from their

non-religious counterparts may have Free Exercise and Equal Protection ramifications. For example, the Court has struck down a state statute which barred clergymen from serving in particular public offices.[19] McDaniel v. Paty, 435 U.S. 618 (1978). Notwithstanding, the Court has never indicated that religious and non-religious organizations always must be treated alike. To the contrary, distinctions may be required in order to avoid Establishment Clause violations as in the case of aid to primary and secondary schools. In Aguilar, 473 U.S. 402, for example, the Court recognized that certain types of aid, which may be permissible for non-sectarian private

[19]Seven of the eight Justices voting so held based primarily on Free Exercise Clause analysis. Justice White found no violation of that provision but found that the statute constituted a violation of the right to equal protection.

schools, are not permissible for their sectarian counterparts.

While the Free Exercise Clause provides a broad range of protections to persons and organizations in the exercise of their religious beliefs and allows some "play in the joints" for government accommodation of religion, this case presents no threat to Free Exercise concerns. Disqualified organizations will not be denied "important benefits" to which they would otherwise be entitled because they are unwilling to commit an act prohibited by religious faith, compare Sherbert v. Verner, 374 U.S. 398 (1963) and Hobbie v. Unemployment Appeals Commission, _____ U.S. _____, 107 S.Ct. 1046 (1987); penalties will not be imposed on any person because she acts in a fashion demanded by her beliefs, compare Wisconsin v. Yoder, 406 U.S 205 (1972); and no government action will have been

taken which makes it impossible for religious practices to be carried out, Cf. Lyng v. Northwest Indian Cemetery Protective Association, 795 F.2d 688 (9th Cir. 1986), cert. granted, 55 U.S.L.W. 3746 (May 4, 1987) (No. 86-1013).

CONCLUSION

For the above-stated reasons, amici urge that the decision of the United States District Court for the District of Columbia be affirmed.

Respectfully submitted,

OLIVER S. THOMAS
200 Maryland Ave., NE
Washington, DC 20002
Counsel of Record
for Amici Curiae

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

OTIS R. BOWEN,
SECRETARY OF HEALTH AND HUMAN SERVICES,

Appellant,

—v.—

CHAN KENDRICK, et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE UNITARIAN UNIVERSALIST ASSOCIATION, THE UNITED SYNAGOGUES OF AMERICA, CATHOLICS FOR A FREE CHOICE AND THE EPISCOPAL WOMEN'S CAUCUS AS *AMICI CURIAE* IN SUPPORT OF APPELLEES

PATRICIA HENNESSEY*
SOLIN & BREINDEL P.C.
501 Fifth Avenue
New York, New York 10017
(212) 370-0325
Attorney for *Amici Curiae*

**Counsel of Record*

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INTEREST OF AMICI

This amicus curiae brief is submitted in support of appellees Chan Kendrick, et al. By letters filed with the Clerk of the Court, appellant, appellees and intervenor-appellants have consented to the filing of this brief.

Amici are religious organizations representing over two million persons and thousands of clergy and congregations in all fifty states. While amici have different religious traditions and beliefs, all are deeply committed to the constitutional principle of religious liberty embodied in the Establishment Clause. The statement of interest of individual amici are set forth in the Appendix.

Amici submit this brief limited to the issue of the constitutionality of the

Adolescent Family Life Act (hereinafter "AFLA"). Amici do not address the issues of standing or severability.

SUMMARY OF ARGUMENT

This case involves issues of central importance to the Establishment Clause. AFLA violates each Establishment Clause test articulated by this Court.

The statute both on its face, discriminates among religious denominations based or their religious tenets. Such facial discrimination requires the application of strict scrutiny. Larson v. Valente, 456 U.S. 288 (1982). AFLA does not pass muster under the strict scrutiny test because there is no compelling state interest which justifies he direct funding of certain religious organizations to teach and counsel based on their religious tenets.

AFLA also fails each prong of the Lemon v. Kurtzman, 403 U.S. 602 (1971) test. An actual purpose of AFLA is to involve religions in their traditional sectarian role as transmitters of values and to promote a religious response and solution to a secular problem. AFLA changed the law of an existing statutory program on adolescent pregnancy by inserting explicitly religious references and AFLA permits the use of explicitly religious material in its programs which indicate government's endorsement of religion. Wallace v. Jaffree, 472 U.S. 38 (1985).

AFLA has the direct effect of advancing religion in that it provides federal funds directly to grantees including churches and parochial schools for teaching and

counselling on subjects which are at the core of religious belief and inherently susceptible to religious indoctrination, Lemon v. Kurtzman, supra; School District of Grand Rapids v. Ball, 473 U.S. 373 (1985). AFLA subsidizes the religious mission of sectarian grantees by, inter alia, funding pre-existing programs and financing programs and material made available only to members of particular congregations and faiths.

AFLA lacks any statutory safeguards to assure that aid cannot be diverted to religious functions. Roemer v. Maryland Public Works Board, 426 U.S. 736 (1976), Committee for Public Education v. Nyquist, 413 U.S. 756 (1973). AFLA constitutes an endorsement of religion, which is of particular constitutional concern because the AFLA program is directed to children and adolescents who are

more likely to perceive government sponsorship of a program run by a religious organization in a religious setting using explicitly religious material as government endorsement of that theology. School District of Grand Rapids v. Ball, supra.

Finally, AFLA compels excessive entanglement of government and religion in the administrative review and audit of AFLA programs, Aguilar v. Felton, 473 U.S. 402 (1985), Lemon v. Kurtzman, supra. In operation the entanglement of government and religion has been pervasive, at every level, from review of grant proposals, to approval of teaching materials to routine site visits and financial audits. Aguilar v. Felton, supra.

Measured by any of this Court's Establishment Clause tests, AFLA is unconstitutional.

I.

THE SIGNIFICANCE OF THIS CASE

The Adolescent Family Life Act ("AFLA") on its face and as it has operated, fails each Establishment Clause test articulated by this Court and jeopardizes the constitutional values of religious neutrality and separation that are the cornerstones of constitutional liberty. The statute explicitly permits and contemplates the payment of federal funds directly to churches and other religious organizations for programs that counsel and instruct children and adolescents in subjects such as family life, sexuality and marriage, topics which are inherently susceptible to religious indoctrination. Consistent with the intent of Congress, that is precisely what has happened. Some of the federally sponsored programs have been held in religious

settings including churches and parochial schools.

AFLA on its face and in operation violates the most fundamental precepts of Establishment Clause. In Everson v. Board of Education, 330 U.S. 1, 16 (1947) Justice Black wrote for the Court:

> . . .no tax in any amount large or small can be levied to support any religious activities or institutions whatever they may be called or whatever form they may adopt to teach or practice religion.

Recently this Court reiterated the continued vitality and understanding of this absolute prohibition:

> Although Establishment Clause jurisprudence is characterized by few absolutes, the Clause does absolutely prohibit government-financed or government-sponsored indoctrination into the beliefs of a particular religious faith.

Grand Rapids School District v. Ball, 473 U.S. 373, 385 (1985) (citations omitted).

AFLA provides government financing for activities which constitute religious indoctrination.

The appearance of government endorsement of particular religious views inherent on the face and in the practice of AFLA is unprecedented in recent Constitutional history. (See Point IV, infra). An equally grave constitutional violation is the explicit discrimination among religious denominations, based on theological content. (See Point II, infra).

From the time of drafting of the Bill of Rights to the most recent decisions of this Court interpreting and applying the Establishment Clause, the importance of strict enforcement of the separation of church and state in protecting fundamental liberty has been recognized:

> The First Amendment's guarantee that "Congress shall make no law respecting an establishment of religion," as our cases demonstrate, is more than a pledge that no single religion will be designated as a state religion. . . . .It is also more than a mere injunction that governmental programs discriminating among religions are unconstitutional. . . .The Establishment Clause instead primarily proscribes "sponsorship, financial support, and active involvement of the sovereign in religious activity."

Grand Rapids School District v. Ball, 473 U.S. at 381.

A review of the extensive record of this case is chilling -- and establishes beyond peradventure that AFLA funds have been used, with government knowledge and approval by religious organizations to disseminate explicitly religious material on sexuality and childbearing to young people. This is precisely the sort of government supported indoc-

trination that the Establishment Clause absolutely forbids.

II.

AFLA IMPERMISSIBLY DISCRIMINATES AMONG RELIGIOUS DENOMINATIONS

AFLA violates the fundamental constitutional principle of neutrality among religious denominations. On its face and as applied the AFLA effects an impermissible discrimination among denominations, and thus it cannot survive this threshold Establishment Clause test.

The District court failed to apply the clear precedents of this Court on discrimination and erred in finding that strict scrutiny was not required because AFLA "does not discriminate on the basis of religious affiliation or belief." 657 F.Supp. at 1557.

Denominational neutrality is a central principle embodied in the Establishment Clause. Government may not "pass laws which aid one religion" or that "prefer one religion over another." Everson v. Board of Education, 330 U.S. 1, 15 (1947); see also Zorach v. Clauson, 343 U.S. 306, 314 (1952). Most recently the Supreme Court expressed and applied this principle in Larson v. Valente, 456 U.S. 228, 244 (1982):

> The clearest command of the Establishment Clause is that one denomination cannot be preferred over another.

When a statute affecting religious organizations discriminates among religious denominations on any grounds, a court must "treat the law as suspect and ... apply strict scrutiny in adjudging its constitutionality." Larson v. Valente, 456 U.S. at 246. AFLA distinguishes among religions on the basis of

theological content, and thus is more invidious than the discrimination invalidated in Larson v. Valente, 456 U.S. 228 (1982). The discrimination is particularly clear since AFLA, unlike the program invalidate in Larson involves direct payment by the government to religious organizations. The benefit is direct, financial and substantial.[1] AFLA

[1] A necessary characteristic of government programs that aid or assist religion without violating the Establishment Clause is that the government aid be equally available to all religious groups. See, e.g., Everson v. Board of Education, 330, U.S. 1, 13-14 (1947) (transportation of all non-public and public school children); Zorach v. Clauson, 343 U.S. 306, 313-14 (1952) (released time off school premises for any religious instruction); Walz v. Tax Commission, 397 U.S. 664 (1970) (property tax exemption for religious and non-religious property): Roemer v. Board of Education Public Works, 426 U.S. 736 (1976) (grants to all private colleges); Tilton v. Richardson, 403 U.S. 672 (1971) (construction grants to all public and private schools); Mueller v. Allen, 463 U.S. 388 (1983) (income tax deductions for parents of either private or public school children). In sharp contrast, AFLA aid in the form of direct
(footnote continued)

clearly effects discrimination among denominations. The combination of an explicit invitation to religious organizations to participate in AFLA programs in their religious capacity and the restrictions on grantees based on their view of abortion limits the participation by "religious organizations" to certain religious denominations. Amici organizations are among the many religious denominations foreclosed from participating in AFLA because they cannot conscientiously counsel adolescents on pregnancy and not discuss the option of abortion.

It is incontrovertible that religious denominations position on abortion vary. Some religions view abortion as a always a sin against God, others view abortion as an option

(footnote continued from previous page)
payments is not available to all religious denominations.

to be pursued under some circumstances, whereas other religions view abortion as a matter of conscience and a religious choice. J.A. 590-607. Amici firmly believe that each denomination approaches the issue as a serious matter of faith (see J.A. 590-607) and that the government must accord each religious position with equal respect. AFLA discriminates among religions by endorsing some explicitly religious teachings on abortion (through financing, publication and dissemination), to the disparagement and detriment of other, equally sincere religious teachings on the subject. This government sponsorship and endorsement of explicitly religious teaching on a religious subject which are inconsistent or antithetical to other religious teachings, is at the core of the constitutional protec-

tions afforded by the Establishment Clause.[2] "Neither [a State nor the Federal Government] can pass laws which aid one religion, aid all religions, or prefer one religion over another. . . . Everson v. Board of Education, 347 U.S. 1, 15-16 (1947)

Methodist religious principles teach that individuals have a moral obligation to make a fully informed and conscientious decision about pregnancy. (J.A. 683)

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[2] Harris v. McRae, 448 U.S. 297 (1980) is not relevant to consideration of the discrimination claim. At issue here, unlike McRae, is the propriety of the federal government's direct funding of religious organizations to teach and counsel children and adolescents on their religious tenets on abortion. A review of the material created and used by AFLA grantees proves unmistakably that the abortion is presented in a theological or religious context. E.g., J.A. 257, 274, 426, 513. While as this Court found abortion may be a moral or secular or health issue for a government, it is quite clear that for the religious grantees of ALFA abortion is a religious issue on which they speak religiously. Cf. Stone v. Graham, 472 U.S. 39 (1980).

Unitarian principles on abortion also promote conscientious decision making by individuals on the issue of abortion. (J.A. 683)

Mainstream Jewish religious teaching is that personhood of a fetus is attained at birth, so abortion cannot be characterized as "murder" or "killing." (J.A. 599-600, 683) Abortion may be acceptable under certain specific conditions, particularly those in which the mother's physical or psychological health is threatened.

Since AFLA does not permit participation by grantees who counsel or refer for abortions and in programs funded by AFLA proscribes discussion of abortion consistent with these religious mandates, amici and other religious organizations cannot participate in AFLA in the manner that Catholic, Mormon and

fundamentalist religious organizations are permitted by the statute and do participate -- as religious organizations.[3]

Many if not most religious denominations, churches and synagogues, sponsor programs and counsel adolescent members on issues of family life, sexuality, relationships and marriage. Amici operate such programs in their churches and synagogues.

The record is clear that AFLA funds have been used to support and promote pre-existing Catholic, and fundamentalist programs

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[3] Amici note that while the proscription against dissemination of their religious position on abortion as a conscientious choice and an option all or in some circumstances in dealing with unwanted often health or life-threatening teenage pregnancy is manifest in the statute, see 42 U.S.C. 300z, and in the administration of the statute, there is apparently no restriction placed on religious grantees from writing or speaking about abortion as sinful or wrong. AFLA grantees have published material and counselled adolescents on that basis under the auspices of AFLA. See J.A. 274, 426, 513.

of family life, sexuality, relationships and marriage. See, e.g., J.A. 210, 223. Not only is this financial aid a direct advancement of the religious mission of those churches (see Point IV, infra) but it also constitutes the most invidious form of discrimination among religious denominations.

No compelling state interest justifies this discrimination. The appropriate inquiry in the case at hand is whether there is a compelling state interest to involve directly and fund certain religious organizations as part of the government's response to the problem of adolescent pregnancy. No compelling state interest has been proferred. Amici contend that there is no such compelling state interest.

Assuming arguendo, that the state interest is the prevention of adolescent

pregnancy through teaching "chastity" and discouraging abortion, then the means employed to achieve that goal, i.e., provision of federal funds directly to certain religious organizations (and foreclosing others) are not sufficiently narrowly tailored. If there is a legitimate secular purpose in teaching chastity, then the government must use exclusively secular means to achieve it. Because there is no compelling state interest which justifies the discrimination among religious groups caused by the AFLA, it cannot survive the strict scrutiny that must be applied.

III.

AFLA LACKS A SUFFICIENTLY SECULAR PURPOSE AND EMPLOYS CONSTITUTIONALLY IMPERMISSIBLE RELIGIOUS MEANS TO ACHIEVE PURPORTED SECULAR GOALS

The first requirement of a legislative program is that it have a secular pur-

pose. Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971; Epperson v. Arkansas, 393 U.S. 97, 98 (1968); Wallace v. Jaffree, 472 U.S. 38, 56 (1985). Mere articulation of a "secular purpose" for challenged legislation is not "sufficient to avoid conflict with the First Amendment." Stone v. Graham, 449 U.S. 39, 41 (1980). The court must look beyond "avowed" purpose of the challenged statute or program and determine whether the "actual purpose" of the legislation is to endorse or disapprove of religion.

Amici believe that there exists a legitimate, secular concern for addressing and alleviating the life-and health-threatening problems which often result from teenage pregnancy. Amici have supported government programs of free, confidential health care and counselling for adolescents. However, it is

clear that a real purpose of AFLA is to involve certain religions in their traditional sectarian role as transmitters of religious values, and to promote a religious solution to the secular problems relating to teenage pregnancy, by directly funding certain religious organizations. That the government may not do. Amici contend that valid secular objectives concerning teenage pregnancy can and must be addressed by the government without resort to direct funding of a few religious organizations.

The Establishment Clause forbids not only government aid to programs which seek to achieve explicitly sectarian goals, but also "the use of religious means to achieve secular ends where non-religious means will suffice." School District of Abington v. Schempp, 374 U.S. 203, 280-81 (1963) (concurring opinion of

Brennan, J.). AFLA clearly transgresses this "means" test. Defendant cannot show that participation by and financial support of religious organizations are necessary to achieve any proper secular goal.

As Establishment Clause jurisprudence has developed over two decades, the secular purpose prong of the tripartite Lemon test, although the most easily satisfied, is not inevitably met. Government programs have been invalidated for lack of secular purpose where the program imposed religious material in secular educational programs for children and adolescents. Epperson v. Arkansas, 393 U.S. 97 (1968); Stone v. Graham, 449 U.S. 39 (1980) or amended an existing statutory scheme to add an explicit religious reference and endorse religion. Wallace v. Jaffree, 472 U.S. 38 (1985). AFLA, which amended an exist-

ing statutory scheme by including explicit religious references, and has used and imposed religious material in its programs directed at children and adolescents. (See, e.g., J.A. 234, 344-53, 367-68; 417-426).

The purpose prong of the Lemon test as refined by this Court in Wallace v. Jaffree, 472 U.S. 38 (1985) is an inquiry into whether the "actual purpose" of the statute "is to endorse or disapprove of religion." 472 U.S. at 56 citing Lynch v. Donnelly, 465 U.S. at 690 (O'Connor, concurring). The methodology utilized by the Court for examining the "actual purpose" of the challenged statute-scrutiny of both legislative history and the replaced statutory program, is applicable and appropriate in this case. Here, as in Jaffree, such examination reveals clearly that an actual purpose of AFLA is to endorse

religion -- specifically to endorse and finance an explicitly religious approach to a secular problem.

The legislative history makes clear that the sponsors of AFLA were "motivated to change the law," Jaffree 472 U.S. at 59. Congress repealed an existing teenage pregnancy prevention program and enacted AFLA in order to promote a religious solution to the problem of teenage pregnancy. The addition of numerous references to religion in the statute itself and the imposition of a programmatic requirement that all grantees religious or secular, involve religions in their program[4] are more than an "indications" that Congress intended to characterize religious teaching on adolescent sexuality and pregnancy as a "favored" - and funded - practice. Jaffree,

[4] 42 U.S.C. § 300-5(a)(21).

472 U.S. at 60. "Such an endorsement is not consistent with the established principle that government pursue a course of complete neutrality toward religion." Id. (citations omitted). The Alabama statute at issue in Jaffree unmistakenly endorsed religion. No less clear is the endorsement of religion embodied in AFLA.

The District Court's formulation and application of the purpose test (657 F.Supp. at 1558-9) is inconsistent with the standard articulated by this Court in Wallace v. Jaffree, and Lynch v. Donnelly (O'Connor, J. concurring). The Court failed to make the detailed comparison of the old statutory scheme and AFLA, which comparison reveals that a significant purpose of the legislation was to endorse a religious response to a secular problem.

However, even assuming arguendo that AFLA reflected a proper secular purpose, the statute must still be invalidated if it fails either the effect or entanglement prong of the Lemon test.[5] It is abundantly clear that AFLA fails both.

IV.

AFLA HAS THE DIRECT
EFFECT OF ADVANCING RELIGION

Government action "may neither advance nor inhibit religion." Lemon v. Kurtzman, 403 U.S. at 612. The second prong of the Supreme Court's Establishment Clause test determines whether a statute has a direct

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5 "This court has announced a three-part test for determining whether a challenged . . . statute is permissible under the Establishment Clause . . . If a statute violates any of these three principles, it must be struck down under the Establishment Clause." Stone v. Graham, 449 U.S. at 40. (Emphasis supplied.)

effect of advancing religion. Committee for Public Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 783 n.39 (1973). The District Court's holding that on its face and as applied AFLA has "the primary effect of advancing religion" (657 F.Supp. at 1551) is fully supported by the law and the substantial factual record.

In determining the effect of a challenged program this Court has examined three factors: (1) the nature of the aid; (2) nature of the activities sponsored; and (3) the nature of the institution or individuals receiving the aid. AFLA provides federal funds directly to grantees, and permits religious organizations, including churches, to become grantees and thus to receive federal funds directly for programs of teaching and counselling. AFLA programs involve one-on-one

and group counselling and teaching on issues such as sexuality, marriage and pregnancy. AFLA funds are used to pay teacher and counsellor salaries and fund the creation, and dissemination of written and media materials. Thus the nature of the aid involved is comparable to teachers' salaries, textbooks and instructional material considered by the Court in Lemon, supra; Meek, supra; Aguilar, supra; and Wolman v. Walter, supra. The direct provision of funds to sectarian institutions for this purpose, is intolerable under the Establishment Clause.[6]

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[6] Amici submit there is no question that the involvement of religious organizations contemplated under AFLA is qua religious organization, not because the religious organization performs a secular task, e.g. operates a hospital. It strains credibility to ague that religious organizations were included in AFLA only to the extent that religious organizations sponsor and participate in community organizations. Such an interpretation renders the statutory language redundant.

(footnote continued)

AFLA has subsidized the primary religious mission of sectarian institutions that receive its funds by augmenting or combining with their religious education, e.g., J.A. 117, 166, 210, 223, 341, 408, 412-13. AFLA programs have been directly controlled by the religious aim of grantees including priests and parish advisory committees, J.A. 147, 197.

The Supreme Court has struck down numerous government programs that provided aid directly to religious schools or to teachers employed by religious schools, as AFLA provides aid directly to religious institutions and/or their employees, because such programs

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Moreover, examination of the programs actually funded shows that direct involvement by core religious functions such as parishes and parochial schools and the use of explicitly religious material is deemed by the government to be within the purpose of the act.

inevitably advance religion. Grand Rapids School District v. Ball, 473 U.S. 373 (1985). Lemon v. Kurtzman, 403 U.S. 602 (1971); Meek v. Pittenger, 421 U.S. 349 (1975), Committee for Public Education v. Nyquist, 413 U.S. 756 (1973). As described in detail below the direct funding of religiously affiliated teachers and counsellors has actually had the effects that this Court warned against.

It is abundantly clear that government funding of religiously infused teaching and counselling cannot be permitted consistent with the Establishment Clause. In Lemon v. Kurtzman, the Supreme Court invalidated a program that provided state aid to teachers of purely secular subjects in religiously affiliated schools, in part because the court found an impermissibly high risk that religious values and views might be transmitted to stu-

dents during instruction of mathematics, history and other secular subjects:

> In terms of potential for involving some aspect of faith or morals in secular subjects, a textbook's content is ascertainable, but a teacher's handling of a subject is not. We cannot ignore the danger that a teacher under religious control and discipline poses to the separation of the religious from the purely secular aspects of precollege education. The conflict of functions inheres in the situation.

403 U.S. at 617.

That rationale was reaffirmed and reinforced in Grand Rapids v. Ball:

> [w]hether the subject is "remedial reading", "advanced reading" or simply "reading" a teacher remains a teacher and the danger that religious doctrine will become intertwined with secular instruction persists.

473 U.S. at 388, citing Meek v. Pittenger.

Amici submit that when the subjects are as value-laden and closely tied to religious tenets as sexuality, procreation and

family, the transmission of religious values is unavoidable. And, as the record amply reflects, the risk has not been avoided by AFLA in operation.[7] AFLA programs have been

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[7] This rule does not require the court to find that potential AFLA grantees, who are affiliated with religious organizations, would intentionally violate the Establishment Clause. As the Supreme Court found in Lemon, it is not a matter of bad faith, but rather the inextricable combination of functions which precludes direct state aid to religiously affiliated teachers:

> We need not and do not assume that teachers in parochial schools will be guilty of bad faith or any conscious design to evade the limitations imposed by the statute and the First Amendment. We simply recognize that a dedicated religious person, teaching in a school affiliated with his or her faith and operated to inculcate its tenets, will inevitably experience great difficulty in remaining religiously neutral. Doctrines and faith are not inculcated or advanced by neutrals. With the best of intentions such a teacher would find it hard to make a total separation between secular teaching and religious doctrine. What would appear to some to

(footnote continued)

presented in parochial schools and other religious settings which contain religious symbols. J.A. 114, 166, 170-171, 211, 412-13. Some AFLA programs were opened or closed by a priest with prayer, J.A. 248, 278.

For the sectarian grantees both the counsellor/teachers and the materials are subject to the specification of religiously affiliated supervisors and teachers, see J.A. 108-09 (grantee refused to alter religious content of program), 197, 284-85. The exercise of such control was fatal to the program invalidated in Lemon v. Kurtzman, supra; Levitt v. Committee for Public Education, 413, U.S. 472 (1973) and Wolman v. Walter, 433 U.S. 299 (1977).

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> be essential to good citizenship might well for others border on or constitute instruction in religion.

403 U.S. 618-19

The record is replete with examples of explicitly religious material used in AFLA programs. Material produced or used by current AFLA grantees is explicitly religious, e.g., "47 Reasons to Wait," used by grantee Women's Choice:

> 1. God commands us to be pure . . . .
> 5. God has set sex aside for the marriage relationship . . . .
> 26. Jesus can fill the need for intimacy without sex . . . .
> 30. It is poor testimony for Christ.[8]

In a similar vein is the Woman's Choice publication, "37 Ways to Say No":

. . . .

> 3. Build a relationship With Jesus so that your loneliness will be satisfied . . . .
> 8. Meditate on God's Word to be 'transformed by the renewing of your mind.' . . . .
> 21. Commit each date to the Lord; be Christlike and act like Jesus would if he were on a date.[9]

The religiosity of this message is equivalent to the religious content of the Ten Commandments. Cf, Stone v. Graham, 449 U.S. 39 (1980).

AFLA Lacks Any Safeguards

As the District Court correctly found AFLA, perhaps alone among statutory programs challenged under the Establishment Clause, contains no restrictions whatsoever against the teaching of religion qua religion or any attempt to restrict the education and counselling process from "intentionally or inadvertently inculcating religious belief." 657 F.Supp. at 1562-63, (footnote omitted).

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[8] Material from current AFLA grantees, not contained in the Joint Appendix, has been lodged with the Court by NOW Legal Defense Fund.

[9] Material lodged, see n.8, supra.

In order to sustain a program which channels funds directly to religious institutions from facial attack under the Establishment Clause, the aided institutions must demonstrate the capability of separating secular and religious functions. Roemer v. Maryland Public Works Board, 426 U.S. 736, 766 (1976), or contain stringent safeguards to assure that state aid cannot be diverted to sectarian uses. These are very high standards that most religious organizations and institutions, including parochial elementary and secondary schools, are inherently incapable of achieving. Since AFLA does not, on its face, even attempt to limit participation to religious organizations that can separate religious and secular functions this test cannot be satisfied.

For any program involving government funding, the Establishment Clause demands stringent safeguards to assure that government aid for secular purposes cannot be diverted to or combined with uses that advance religion. Unless a government program provides aid to sectarian institutions which, by its nature, cannot be diverted to religious purposes, the government program must provide "effective means for guaranteeing" that aid "will be used exclusively for secular, neutral, and non-ideological purposes." Committee for Public Education v. Nyquist, 413 U.S. at 780; Larkin v. Grendel's Den, Inc., 459 at 125-26. An examination of the guarantees that have failed to past muster reveals that this requirement of guarantees is both fundamental and stringent. Lemon v. Kurtzman, 403 U.S. at 619 ("pervasive restrictions"); compare Levitt v.

Committee for Public Educ. & Religious Liberty, 413 U.S. 472 (1973) (program for reimbursement of testing and scoring) with Committee for Public Educ. & Religious Liberty v. Reagan, 444 U.S. 646, 658 (1980).

The statute contains no safeguards that in any way can guarantee that federal funds will be used exclusively for secular, non-ideological purposes. Indeed, even if proferred, such guarantees would not be meaningful because the nature of the activities funded under AFLA -- teaching and counselling -- are so open ended that the possibility of an effective secular guarantee is precluded. Committee for Public Educ. v. Nyquist, 413 U.S. at 780. Lemon v. Kurtzman, 403 U.S. at 618-19. School District Grand Rapids v. Ball, 473 U.S. at 387-88 (1985). As the District Court properly found, AFLA has not and cannot

provide such safeguards (657 F.Supp. at 1562-63), which is fatal to the statutory scheme.

Moreover, amici contend, based on the experience and operation of their own congregations, that the religious personnel most likely to apply for participation in AFLA are those who teach and counsel on matters of adolescent sexuality, pregnancy, and family life for their congregations, core religious functions from which secular functions cannot be separated.[10]

In sum, given: (1) the nature of the aid (direct financial payment); (2) the nature of the activities sponsored (counselling and teaching on matters of sexuality and family life); and (3) the nature of the institutions receiving the aid (churches and

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10 The record reflects that priests (in clerical garb) and nuns have been principal presenters and administrators in AFLA sponsored programs. See J.A. 208, 278, 297.

other religious organizations, not students, parents, or individual participants in AFLA) and the lack of proferred or possible safeguards to guarantee that aid would be used solely in a secular, nonideological manner. This Court's precedents compel the conclusion that a direct effect of AFLA is to advance that religious purposes of religious grantees.

AFLA Constitutes An Endorsement of Religion

The danger which the Establishment Clause protects against is not only to creation of a monolithic national church but also the fusion of government and religion, which begins when government endorses or supports the theological tenets of one religion or several, over others. As this Court has said:

> The wholesome "neutrality" of which this Court's cases speak thus stems from a recognition of the teachings of history that powerful sects or groups might bring about a fusion of

> government and religious functions or a concert or dependency of one upon the other to the end that official support of the state or federal government would be behind the tenets of one or of all orthodoxies; this is what the Establishment Clause prohibits.

School District of Abington v. Schempp, 374 U.S. at 222.

AFLA, on its face and most clearly, in practice, has placed the government "behind the tenets" of some religious, to the detriment of amici and other religions. AFLA religious grantees and AFLA administrators consider that the government has endorsed their religiously based programs and approach (see e.g., J.A., 213 "Bishop Announces Grant . . . . given for a new course in family centered sex education which will be offered to parish religious education programs . . ."), J.A. 120.

As this Court noted most recently in Grand Rapids v. Ball, supra, programs directed at children and adolescents, like AFLA, is subjected to particularly rigorous Establishment Clause scrutiny. "The inquiry into this kind of effect must be conducted with particular care when many of the citizens perceiving the government message are children in their formative years." 473 U.S. at 390 (footnote omitted). This Court and circuit Courts have fashioned an analytical distinction of constitutional dimension between programs involving college students or adults, and programs involving children and adolescents. School District of Abington v. Schempp, 374 U.S. at 252-53. ("This distinction warrants a difference inconstitutional results."); Engel v. Vitale, 370 U.S. 421 (1962); see Roemer v.

Maryland Public Works Board, 426 U.S. 736, 764, (1976).

Adolescents are less able to distinguish secular from sectarian functions. The risk is that adolescents will perceive government sponsorship of a program run by a religious organization as a government endorsement of that organization and its theology. Activities that are permitted on university campuses, such as voluntary prayer group meetings, are prohibited in secondary schools. Widmar v. Vincent, 454 U.S. 274 (1981); Brandon v. Board of Guilderland Central School, 635 F.2d 971, 978 (2d Cir. 1980), cert. denied, 454 U.S. 1123 (1981).

Adolescence is a time of maturing, values clarification and the beginning independent decision making. Chief Judge Kaufman of the Second Circuit explained:

> ". . . .Misconceptions over the appropriate roles of church and state learned during one's school years may never be corrected. As Alexander Pope noted, 'Tis Education forms the common mind,/Just as the twig is bent, the trees's inclin'd.' (Epistle to Lord Cobham)."

Brandon v. Board of Guilderland Central School, 635 F.2d at 978.

Amici submit that the same concerns are present when adolescents observe that one or several churches or religious organizations receive government funds for running a "secular" program for adolescents. It is inevitable that adolescents will perceive an expression of government approval for those denominations that participate in AFLA.

By providing government sponsorship of programs that employ teachers and counsellors affiliated with particular churches, AFLA, in effect, assists those churches to "gain and keep adherents." School District of

Abington v. Schempp, 374 U.S. at 228 (concurring opinion of Douglas, J.). The Establishment Clause does not permit use of the government to advance religion in this manner:

> The Establishment Clause is not limited to precluding the State itself from conducting religious exercises. It also forbids the State to employ its facilities or funds in a way that gives any church, or all churches, greater strength in our society than it would have by relying on its members alone.

Id. at 229. Government sponsorship of programs run by and identified with specific religious denominations will certainly have the effect of giving those denominations greater strength in recruiting adolescent members.

Bradfield v. Roberts, 175 U.S. 291 (1899), heavily relied on by the government and the intervenors, is not analogous. First, the activity involved in Bradfield, operating

a hospital, was found to be a secular activity performed pursuant to a secular charter. The activity is different in nature from teaching and counselling, which are core religious functions, in a way that hospital administration is not. Second, a crucial factor in Bradfield was the finding of non-discrimination -- that the benefits of the Congressional grant were available to all persons irrespective of religious belief. On this point as well, the distinction from AFLA is evident. Grants are not available to all religions that offer programs on adolescent sexuality and childbearing. (See Point II, supra). In addition, at least some AFLA programs have been limited to participation to adolescents of a particular religious faith.[11] Thus on

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[11] This limitation is effected by, inter alia, publicizing the program exclusively or principally in church bulletins or letters to
(footnote continued)

its face and on the facts AFLA is distinguishable from Bradfield.

There is no suggestion in Bradfield that it is permissible for sectarian organizations performing purely secular functions use explicitly religious materials or in any way attempt to inculcate religious belief. As Bradfield has been interpreted by this Court it is apposite only in situations where the separation of secular and sectarian functions is not only theoretically possible, but also guaranteed by adequate statutory or programatic safeguards. Cf, e.g., Roemer v. Maryland Public Works Board, 426 U.S. 736 (1976); Tilton v. Richardson, 403 U.S. 672, 676-77,

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members of a congregation, J.A. 117, 170, 204; or by presenting programs in parochial school classes, J.A. 412-13, or in place of the usual Confraternity of Christian Doctrine (CCD) classes, J.A. 408; or in religious education classes. J.A. 210.

679 (1971) (Act ensured aid would be devoted to secular functions.) AFLA contains no such guarantees or safeguards. Given the nature of the activities involved -- counselling and teaching -- such safeguards can never be effective since the activities are so close to the core of religious functions.

Amici submit that striking down AFLA will not end the participation by religious groups in providing necessary public welfare functions, any more than the consistent ban on State aid to parochial schools did. Religious organizations may constitutionally perform purely secular functions in a purely secular way (and may receive government funds in support of such activities.) This case does not present a compelling reason for this Court to depart from decades of settled precedent which proscribes direct aid to churches and paro-

chial schools for educational and counselling activities (because such subsidized activities invariably advance the religion); and government endorsement of particular religious views.

Lemon v. Kurtzman, supra; Meek v. Pittenger, supra and Aguilar v. Felton, supra, are more analogous authorities because the nature of the activities (teaching) are closer to what is offered though AFLA (teaching and counselling) and the nature of the aid is similar (direct grant, for programs and materials as well as teachers salaries). The problems presented by the nature of the aid and the nature of the institutions, i.e., advancement of religious purpose and inability to separate secular and religious functions were not present in Bradfield.

It is no defense to an Establishment Clause challenge that AFLA is in the nature of an experiment -- a small program to attempt a new approach to a vexing social problem. The liberty interests embodied in the Establishment Clause are fundamental, and their violation is irreparable. This Court has stated unequivocally that government may not experiment with sponsorship of religious solutions to secular problems:

> ". . .it is no defense to urge that the religious practices here may be relatively minor encroachments on the First Amendment. The breach of neutrality that is today a trickling stream may all too soon become a raging torrent and, in the words of Madison, 'it is proper to take alarm at the first experiment on our liberties.'"

Abington School District v. Schempp, 374 U.S. at 225 (citations omitted).

V.

AFLA COMPELS EXCESSIVE ENTANGLEMENT OF GOVERNMENT AND RELIGION

AFLA invites and indeed compels excessive entanglement of government and religion by encouraging and permitting grants to religious institutions. The Supreme Court has identified two components of this prong of the Lemon test: (1) whether the challenged programs involve administrative interference with surveillance of religious activities; and (2) whether the challenged program fosters political divisiveness. Lemon v. Kurtzman, 403 U.S. at 621-22. AFLA fails both parts of the entanglement test. In making these determinations, the Court has directed inquiry into three factors: the character and purposes of the aid recipients; the nature of the aid and the resulting relationship between government and religion. Id. at 615.

Two types of monitoring are a necessary part of an AFLA program: (1) routine financial auditing of the use of AFLA funds; and (2) surveillance to guarantee that AFLA programs are not used to transmit religious ideology. In this context both types of monitoring are excessively entangling.

Excessive administrative entanglement is inevitable when the government provides aid directly to religious organizations or institutions, as is permitted and encouraged by AFLA. All programs that receive government grants are subject to inspection and audit. Such necessary surveillance "creates an intimate and continuing relationship between church and state and an excessive entanglement." Lemon v. Kurtzman, 403 U.S. at 622.

AFLA involves the government in the review and approval of texts created by religious organizations for use in AFLA sponsored teaching and counseling. A large part of AFLA program is counseling or teaching. This Court has consistently recognized that it is impossible to monitor the content of a teacher's (or counsellor's) activities and speech without an excessive entanglement. Meek v. Pittenger, 421 U.S. 349, 370 (1975); Lemon v. Kurtzman, supra; Wolman v. Walter, 433 U.S. 299 (1977); Aguilar v. Felton, 473 U.S. 402 (1985); Grand Rapids School District v. Ball, 473 U.S. 373 (1985). This is true whether the teacher or counsellor is religiously affiliated or not.

The record shows and the government has conceded, that a number of AFLA programs are being presented in parishes and parochial

schools. J.A. 114, 166, 170-71, 210-11, 341, 408, 412-13, 518. The monitoring of those programs presents the precise entanglement problem that required invalidation in Aguilar v. Felton, Lemon v. Kurtzman, Meek v. Pittenger.

The inquiry that this Court must make regarding administrative entanglement is the same as that made in the parochial school aid cases, and the holdings in those cases must govern here. The most relevant factor is that the aid under AFLA goes directly to religious institutions, not to adolescents or parents. This type of aid is not less entangling than the following programs and practices, which have been held to excessively entangle government and religion: public employees providing remedial programs in non-public schools (Aguilar v. Felton, 473 U.S. at

408-14); subsidies to teachers of secular subject (Lemon v. Kurtzman, 403 U.S. at 615-18); the loan of equipment to non-public schools (Meek v. Pittenger, 421 U.S. 371); furnishing auxiliary remedial services (id. at 372); and providing non-participating supervision of students during voluntary prayer meetings (Brandon v. Board of Education of Guilderland Central School District, 635 F.2d 971, 979 (2d Cir. 1980).

In operation, the entanglement between government and religion in the administration of AFLA has been pervasive and overwhelming. Religious affiliated grant readers reviewed and made recommendations on proposals from both religious and secular grantees. J.A. 98, 103, 108-109, 113. The readers rejected some applications on the ground that religion was not sufficiently present.

J.A. 132-34, 135. Once grants were awarded, religious grantees submitted explicitly religious material to the supervising agency for approval for use in AFLA programs, and received such approval from the Government. (J.A. 630 . In addition, government employees monitored (or should have monitored) programs which were given in parishes and parochial schools, including on-site inspections. This type of involvement is clearly entangling.

Even where monitoring of content is possible and effective, such supervision "inevitably results in the excessive entanglement of church and state, and Establishment Clause concern distinct from that addressed by the effect doctrine." Aguilar v. Felton, 473 U.S. 402, 409 (1985).

The entanglement involved in AFLA is far more extensive than the entanglement found

to be excessive in Aguilar, Lemon or Meek. AFLA supervision involves more than a set of rules and monthly unannounced visits to parochial school classrooms to monitor the performance of public school employees, see Aguilar v. Felton, 473 U.S. at 428 (O'Connor, J. dissenting). In addition to the normal financial monitoring, religious readers review applications, and government employees work with religiously affiliated persons to shape the content of AFLA programs. Disputes over the religious content of AFLA programs have led to the curtailment or dropping of programs.[12]

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[12] At least one AFLA program has been defunded for being insufficiently religious, see J.A. 132-35, and at least one other was reprimanded and defunded for being too religious or accessible to only a limited a group, see J.A. 742. Both of these examples reflect a degree of entanglement between government and religion which is intolerable under our constitutional framework: "state" inspection
(footnote continued)

Moreover, AFLA possess the exact divisive political potential identified by the Supreme Court in Lemon -- "successive . . . appropriations that benefit relatively few religious groups." 403 U.S. at 623. While AFLA programs will not necessarily require "successive annual" appropriations, it is very likely that program grantees, including religious organizations, will seek continuing government support for both their individual grants and the AFLA program as a whole and, as a result, "political factions supporting and opposing the programs will divide along religious lines." Id. See also Meek v. Pittenger, 421 U.S. 349, 372.

(footnote continued from previous page)
and evaluation of the religious content of a religious organization creates a "relationship pregnant with the dangers of excessive government direction of . . . churches." Lemon v. Kurtzman, 403 U.S. at 620.

This Court need not engage in speculation of future controversy over AFLA funding in order to find constitutionally fatal political divisiveness. AFLA embodies not only the potential for future political divisiveness but a past history of highly charged political action to enact religious belief, which parallels the explosive political context of the school prayer cases. See Engel v. Vitale, 370 U.S. 421 (1962). This program has fostered political divisiveness in the communities where amici and plaintiff clergy live and worship, and operate their family life programs for adolescents in competition with the religious programs taking place in the parish or church school down the street which has been augmented by federal funds and benefitted by government endorsement. The phenomenon of political divisiveness inherent in AFLA on its

face and fulfilled in its practice is concrete, not elusive. Aguilar v. Felton, 473 U.S. at 429 (O'Connor, J. dissenting).

The constitutional principles of the religion clauses of the United States were shaped by recognition of the

> . . . anguish, hardship and bitter strife that could come when zealous religious groups struggled with one another to obtain the Government's stamp of approval. . .

Id. at 429.

AFLA fails both the administrative entanglement and political divisiveness tests of Lemon v. Kurtzman, and its progeny, and must be held to be unconstitutional on this ground as well.

CONCLUSION

For all of the foregoing reasons amici respectfully request this Court find

that AFLA violates the Establishment Clause of the united States Constitution.

Respectfully submitted,

PATRICIA HENNESSEY*
Solin & Breindel P.C.
501 Fifth Avenue
New York, New York 10017
(212) 370-0325
Attorney for Amici Curiae

*Counsel of Record

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APPENDIX

APPENDIX

STATEMENT OF INDIVIDUAL AMICI

Catholics for a Free Choice is an independent national membership organization established in 1974. One of CFFC's objectives is to protect the legal right of all women and girls to act as moral agents in decisions related to sexuality and reproductive health care without coercive legal or quasi-legal interference by religious institutions. As catholics, CFFC members support policies of strict separation of church and state based not only on the U.S. Constitution but also on the Roman Catholic Declaration on Religious Liberty (Vatican II Dignitatis humanae, 7 December 1965) which declares:

> ". . . the civil authority must see to is that the equality of the citizens before the law, which is itself an element of the common good of society, is never violated either openly or covertly for religious reasons and that there is no discrimination among its citizens."

The Episcopal Women's Caucus ("EWC") is an organization of Episcopal laity, bishops, priests and deacons who are committed to the full inclusion of women in all aspects of life of the church and the world. The EWC and the Episcopal church as a whole have long been on record as strong supporters of the individual's right and responsibility to make

informed decisions concerning contraception and abortion. The EWC believes that AFLA will substantially interfere with efforts to allow people to make such well-informed decisions and will result in government-sponsored promotion of religious tenets, which are anti-ethical to the beliefs of our organization and the teaching of our church.

The Unitarian Universalist Association ("UUA") has its national headquarters in Boston, Massachusetts and represents 138,000 adherents of liberal religious values and has 1,010 churches with 1,047 clergy. The Unitarian Universalist Association seeks to join in this brief based upon its policy of amicus intervention in First Amendment cases. UUA is a member-organization of PEARL which is submitting a brief amici curiae.

The United Synagogue of America represents over 1.5 million Conservative Jews and over 800 Conservative congregations throughout the United States. It is deeply committed to the preservation of individual liberties and the separation of church and state. At its 1975 Biennial convention, a resolution was passed stating that "abortion involves very serious psychological, religious and social problems, but the welfare of the mother must always be our primary concern." The resolution emphasized that abortion is permissible under certain circumstances, particularly where the mother's physical or psychological health is threatened. The resolution also urged affiliated congregations to oppose any legislative attempts to weaken the force of the Supreme

Court's decision allowing for choice in this matter.